10-19-2010

McCann v. McCann Clerk's Record v. 5 Dckt. 37547

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Vol. 5 of

In the
SUPREME COURT
of the
STATE OF IDAHO

Ronald R. Mc Cann,

Plaintiff/Appellant,

v.

William V. Mc Cann, Jr., et al,

Defendants-Respondents,

Mc Cann Ranch & Livestock Company, Inc.,

Nominal Defendant-Respondent.

CLERK'S RECORD ON APPEAL
Volume V

Appealed from the District Court of the Second Judicial District of the State of Idaho, in and for Nez Perce County

Honorable George D. Carey, District Judge

Supreme Court No. 37547

Attorney for Plaintiff
Timothy Esser

Attorney for Defendant
Merlyn W. Clark

37547

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. MC CANN, Plaintiff-Appellant, v. WILLIAM V. MC CANN, JR. and GARY E. MEISNER, individually as a director of McCann Ranch & Livestock Company, and as a shareholder of McCann Ranch & Livestock, Inc., in his capacity of the William V. McCann, Sr. Stock Trust, Defendants-Respondents, MC CANN RANCH & LIVESTOCK COMPANY, INC., Nominal Defendant-Respondent.	SUPREME COURT NO. 37547 TABLE OF CONTENTS VOLUME V

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,

Plaintiff,

vs.

WILLIAM V. McCANN, JR., and GARY E. MEISNER,

Defendants.

McCANN RANCH & LIVESTOCK COMPANY, INC.,

Nominal Defendant.

Case No. CV 08-01226

DEFENDANT WILLIAM V. MCCANN JR.'S MOTION FOR SUMMARY JUDGMENT

Defendant, William V. McCann, Jr., through his counsel of record, joins in the Motion for Summary Judgment filed by Defendant McCann Ranch & Livestock, Inc. and adopts the Affidavits and Memorandum In Support of Motion as if filed by this Defendant.

DATED THIS 4th day of January, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By _____
Merlyn W. Clark, ISB No. 1026
Attorneys for Defendant William V. McCann, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of January, 2010, I caused to be served a true copy of the foregoing DEFENDANT WILLIAM V. MCCANN JR.'S. MOTION FOR SUMMARY JUDGMENT by the method indicated below, and addressed to each of the following:

Timothy Esser ESSER & SANDBERG, PLLC 520 East Main Street Pullman, WA 99163 [Attorneys for Plaintiff]	____ U.S. Mail, Postage Prepaid ____ Hand Delivered ____ Overnight Mail ____ E-mail __X__ Telecopy: 509.334.2205
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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN, Plaintiff, vs. WILLIAM V. McCANN, JR., and GARY E. MEISNER, Defendants, McCANN RANCH & LIVESTOCK COMPANY, INC., Nominal Defendant.	Case No: CV 08-1226 DEFENDANT GARY MEISNER'S JOINDER IN McCANN RANCH & LIVESTOCK COMPANY'S MOTION FOR SUMMARY JUDGMENT

Defendant Gary Meisner joins in the MOTION FOR SUMMARY JUDGMENT filed by defendant McCann Ranch & Livestock Company, Inc., and joins in the affidavits and memorandum in support.

DATED this 19th day of January, 2010.

CLEMENTS, BROWN & McNICHOLS, P.A.

By: _____
MICHAEL E. McNICHOLS

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of January, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,

Plaintiff,

v.

WILLIAM V. McCANN, JR., and GARY E. MEISNER, individually as a director of McCann Ranch Livestock Company, Inc., and as a shareholder of McCann Ranch & Livestock, Inc., in his capacity as Trustee of the William V. McCann, Sr. Stock Trust,

Defendants,

McCANN RANCH & LIVESTOCK COMPANY, INC.,

Nominal Defendant.

No. CV08-01226

PLAINTIFF'S RESPONSIVE SUMMARY JUDGMENT MEMORANDUM

INTRODUCTION

I.C. 30-1-1430(2) establishes two, and only two, elements necessary to obtain a court ordered dissolution of a for profit corporation, in a proceeding brought by one of its shareholders: 1) that those in control of the corporation have acted in an oppressive manner, and 2) said oppression threatens irreparable injury to the corporation.

The Defendants concede that Plaintiff can introduce sufficient evidence to establish oppression. The issue today is whether that evidence of oppression, including all reasonable inferences which can be drawn therefrom, creates a material issue of fact as to whether the oppression threatens the corporation with irreparable harm.

What is irreparable harm to a closely held Idaho corporation? Defendants offer no proposed definition of this element. They argue that because the Corporation is operating profitably, Plaintiff's evidence necessarily is insufficient. The amount of the Corporation's profits might be relevant, but do not control this issue. It is possible that the Court may choose to make a factual determination of whether the value of any harm caused or threatened is meaningful when compared to profits, but profitability does not rule out the possibility of harm.

We suggest a proper interpretation is twofold: harm that cannot be repaired and which harm involves a material financial amount.

Curiously, the defense cites authority from other jurisdictions for the proposition that dissolution is a draconian remedy and therefore the Court's power should be exercised "with great restraint and only upon a strong showing of gross mismanagement." Defendants' memorandum page 15.

However, the defense immediately thereafter quite correctly notes that Idaho's shareholder dissolution statute is unique. Contrary to the Model Corporation Act and the

dissolution statutes of virtually the rest of the United States, Idaho adds threat of irreparable harm as an additional element. Under the Model Act, and the law of the other states, for example, RCW 23B.14.300 and .340 in Washington State, a shareholder of a closely held corporation who can establish oppression is entitled to seek equitable relief – the Court may, but need not order dissolution, the court may grant a remedy tailored to the oppressed shareholder's situation. It was this sort of remedy we sought in Count I. We alleged a squeeze out and sought an individual remedy.

Under the defense analysis, the shareholder of a closely held Idaho corporation who is the subject of oppression can bring no direct action, seeking a personal remedy, rather, he is limited to a corporate dissolution action and must establish this additional element. In interpreting this element, this Court should be conscious of its prior ruling. In short, we believe the appropriate definition of "threat of irreparable harm" given the uniqueness of the statutory element and this Court's determination that a shareholder in Ronald McCann's position, although oppressed, may not bring an individual action, must necessarily be liberally construed in light of the evidence of oppression and the closely held nature of the Corporation.

ARGUMENT AND AUTHORITIES

The defense motion should be denied because the very substantial evidence of oppression creates a threat of irreparable harm. The material issues of fact are many.

A. The substantial transfers from the Corporation to Gertrude McCann further no legitimate corporate purpose. They have harmed the Corporation by depleting its available and needed cash, thus not being able to meet its responsibility to distribute profits to its shareholders. And it threatens future harm in that it is unlikely that the Corporation will be able to recover what it claims Gertrude McCann owes.

1. Since January 1, 2001, through December 31, 2008 (we have yet to receive the yearend totals for 2009), the Corporation has advanced $282,036 for the benefit of Gertrude McCann – see Exhibit A to Dennis Reinstein's Affidavit. This does not include the purchase of her house. Of this total, the Corporation asserts that approximately $151,678 should be considered advances for which Mrs. McCann is obligated to repay. The balance takes the form of alleged upkeep and maintenance on Mrs. McCann's home which the Corporation claims to have purchased for fair market value. In considering whether these advances create a threat of irreparable harm, this Court should consider that Mrs. McCann denies any responsibility to repay these sums:

> Q. Mrs. McCann, what I'm trying to figure out, if this document means what it says, I'm trying to figure out why you would owe the corporation a hundred and sixty-five thousand dollars?
>
> A. I don't owe them a dime. In my book, I don't owe them nothing. They owe me.

2. While Mrs. McCann denies owing anything to the Corporation, she has also testified she has done nothing to earn the advances from the Corporation:

> Q. Okay. When was the last time you worked for the corporation?
>
> A. I don't know. I don't remember. What do I do for the corporation?
>
> Q. That's what I'm trying to find out. Since you've been eighty-fie years old, have you worked for the corporation?
>
> A. I used to fix lunch once in a while for them when they was branding, and that's the only thing I ever did. (Gertrude McCann Deposition page 48)

Thus, the record at this point establishes that the Corporation has paid substantial sums to Mrs. McCann for nothing – for no corporate purpose. But rather, for the reason William

McCann, Jr. testified to at his deposition: "Because she needed the money". William McCann, Jr. Deposition page 84.

3. Ronald McCann has figured out that it is likely to do him no good for the Corporation to assert a creditor claim against his mother's estate in the event of her death, as the history of oppression establishes that cash in the Corporation doesn't result in dividends flowing to him (or any other benefit). And thus, as he states in his affidavit, as a natural heir of his mother, he will oppose any effort by the Corporation to recover these bogus transfers and deprive him of an inheritance from his mother.

4. The defense argues in its memorandum that if those in control of the Corporation have made improper advances, a derivative action can fix the problem. However, the evidence at this point establishes that William McCann, Jr. denies any misconduct – he denies that the transfers to his mother subject him to personal liability. Most telling is the lack of action by the Defendants in regard to the resolution adopted September 6, 2000:

> BE IT RESOLVED that the Corporation shall terminate the current consulting agreement with and discontinue making compensation payments to A. Gertrude McCann and to initiate such reasonable action as shall be necessary to determine if any ultra vires compensation has been paid to A. Gertrude McCann and if so, to secure or recover for the Corporation such payments, if any there be, from A. Gertrude McCann, who is now 84 years of age.

The evidence is that the Corporation has recovered none of the ultra vires payments ("consulting fees" of over $100,000) to Mrs. McCann and the statute of limitations has clearly expired. The evidence is that the recipient of these advances denies any liability therefore. The evidence is that the Corporation has not carried the promissory notes on its books as legitimate assets or liabilities.

The "cure" suggested by the defense, a subsequent derivative action against those who authorized these transfers, itself harms the Corporation – it would consume the energy and resources of the Corporation and its principals.

5. Accountant Snowball's affidavit at Paragraph 9 puts the Corporation's income from 2002-2008, inclusive at $851,487.60. Payments to Gertrude McCann of $282,036 (Reinstein Affidavit) plus house payments total well over $600,000. The Court will have to use its fact finding power to determine what portion of the $600,000 is improper and then use its fact finding power to determine if the improper payments are material in comparison to the Corporation's income.

B. The Corporation's history of utilizing its cash to make advances to Gertrude McCann, which are not usual and ordinary business expenses, but are part of the Defendants' efforts to squeeze out Ron McCann, threaten the Corporation with the irreparable harm of adverse tax consequences.

The corporate CPA, Dorothy Snowball, considers the financial transactions between the Corporation and Gertrude McCann to be legitimate expenses which do not expose the Corporation to any risk of liability for tax fraud. Plaintiff's experts, CPA Dennis Reinstein and CPA Karen Ginnett, disagree. This is very material issue of fact. They point out that in fact neither the IRS nor the State of Idaho has audited the Corporation since approximately 1986 and at that time the State found that the Corporation's practice of paying personal expenses for William McCann, Sr. and his wife, Gertrude, in fact was improper. And the evidence presently before the Court is that the Corporation since that audit nevertheless has continued with its practice of paying personal expenses for Gertrude's benefit. The balance presently is approximately $198,000.

As Plaintiff's experts opine, paying auto expenses for a 93 year old non-employee is not a legitimate business expense. And Plaintiff's experts note that Gertrude McCann herself has testified that she has done nothing to earn these advances.

And William McCann, Jr. has testified that his rationale in promoting this business practice, is not because it's in the best interest of the Corporation, but simply because "his mother needs the money."

What Plaintiff must establish, is not irreparable harm, but the threat thereof. In this regard, Dorothy Snowball's conclusory affidavit should be compared to that of Karen Ginnett, a person with seven years experience as an Idaho Tax Commission auditor:

> Ms. Snowball states that the expenses paid to Gertrude McCann are legitimate expenses of the Corporation which do not expose the Corporation to any risk of liability for tax fraud. The term "fraud" as used in the tax law, means an actual and deliberate, or willful, wrongdoing with the specific intent to evade tax believed to be owed. The existence of fraud is a question of fact to be determined on a case by case basis considering the **entire record of transactions**. Fraudulent intent can seldom be established by a single act. The Tax Court in *Schmitz, John Noehl*, (1983) TC Memo 1983-482, set out three elements of fraud: (1) a knowing falsehood; (2) an underpayment of tax; and (3) an intent to evade tax. It is important to understand that the tax evasion motive need not be the only motive or even the principal motive for the transaction(s), as long as it is a motive.

The entire record of transactions, between the Corporation and Gertrude McCann, is extremely relevant in interpreting the post-2001 transactions. Despite the Court's order barring Plaintiff from seeking discovery of pre-2001 transactions, the defense in this summary judgment proceeding has considered itself not to be so limited. The affidavit of James Schoff sets forth eleven paragraphs that purport to describe factual information, **two of which discuss in detail pre-2001 matters**. The affidavit of Gary Meisner includes seven paragraphs of factual information, **four of which discuss pre-2001 matters**. The affidavit of the corporate CPA,

Dorothy Snowball, contains twenty one factual paragraphs, **eight of which discuss pre-2001 matters**. And William McCann, Jr.'s affidavit has fifteen paragraphs of factual information, **eleven of which review pre-2001 matters. The defense finds it impossible to enable the Court to understand the current situation without repeated extensive resorting to pre-2001 information.**

The records that have been made available and have been reviewed by our expert include the minutes of the Board meetings. These minutes, and the corporate tax returns, unambiguously disclose the history which prompted the post-2001 corporate advances to Gertrude McCann. In the late nineties the Corporation paid to Gertrude approximately $100,000, taking it as a business deduction for "consulting fees". Upon the objection of Ron McCann, and the advice of the corporate attorney, this practice ceased. And therefore, those in control of the Corporation, Defendants William McCann, Jr. and Gary Meisner, voted to provide Gertrude McCann with a lifetime annuity. This effort was terminated upon the advice of corporate counsel. The amount of the lifetime annuity was to have been $106,000 – it is no coincidence that that is the amount the Corporation then decided it owed Gertrude for "back rent", never having received any such demand for rent from Gertrude McCann or her late husband, William McCann, Sr. This led to the post-2001 promissory notes – a purported liability of the Corporation owing to Gertrude which was never carried on the corporate books. The Corporation then decided to purchase Gertrude McCann's home. And as our expert's affidavit clearly explains, the Corporation paid far more than the fair market value of the house when one considers the relevant details of the transaction – that the Corporation granted to Gertrude McCann a life estate during which it would pay all normal expenses a purchaser would pay, i.e., taxes, insurance, maintenance and upkeep. And then, the corporate resolution of July 2006 states "Whereas, the Corporation has

recently completed the purchase of certain real estate from Gertrude McCann; and, whereas the Corporation's accountant has recommended that these obligations be evidenced by a promissory notes . . . ." Simply put, because the payments on the house purchase had been completed, William McCann, Jr. was desirous of finding a new method of funneling funds to his mother and the actions taken were the creation and execution of the promissory notes at issue.

Since Defendants concede for the purposes of this motion that Plaintiff has been oppressed, we have an oppressed shareholder who has nothing to lose by going to the tax authorities with the facts of this Corporation's behavior. Thus, the Court will have to use its fact finding power to determine the probability of an audit and the amount of the harm which will result. This will have to be added to sums found to be improper payments to Gertrude McCann and this new figure again compared to the Corporation's income to determine materiality.

C. The ten year plus history of oppression, makes clear that those in control of this Corporation will continue in this manner unless or until a court orders otherwise. The depletion of corporate resources defending acts of oppression not only threatens but actually causes irreparable harm.

The defense concedes for purposes of the present motion that it has engaged in oppression, and acknowledges that rather than stopping the activity complained of, it continues. The cash flowing to Gertrude McCann for no legitimate corporate purpose, in exchange for nothing of value from Mrs. McCann continues. And yet, the defense has spent according to their affidavits, over $250,000 to defend and be allowed to continue in this manner. There are only three shareholders of this closely held corporation. Plaintiff owns 36.68% of a multi-million dollar private enterprise. Who wouldn't, if they were in Plaintiff's shoes, seek a remedy against the Defendants' oppressive acts?

Oppression is conceded for purposes of this motion and Plaintiff's affidavit states that in the absence of the oppression, he would not be suing. Thus, the oppression has cost the Corporation at least $250,000 and will have cost much more by the conclusion of the suit.

Thus the Court will need to use its fact finding power to determine the size of this harm. Again, this must be added to the previous amounts that the Court had to determine for comparison with the Corporation's income to determine materiality. When the Court finishes its fact finding, it may find the total harm exceeds the total corporate income and would certainly be a material harm.

To suggest that each time the Corporation improperly spends money Plaintiff must bring a derivative action is simply inaccurate. Annual derivative actions, even if they result in corporate coffers being replenished, cause irreparable harm – the depletion of corporate resources and energy in defending its improper conduct. **And, of course, such derivative actions would provide no direct, individual relief to Ronald McCann, who is being oppressed by a squeeze out.**

D. The Court should not be limited to dissolution as the sole remedy.

Scott v. Trans-SYS., 148 Wn.2d 701, 64 P.3d 1 (2003) involved a corporate dissolution action brought be a stockholder of a closely held corporation. Just as in Idaho, the Washington Supreme Court noted the equitable nature of the action and determined it was not limited to the draconian remedy of dissolution, stating at page 716:

> Alternative Remedies to Dissolution
>
> Dissolution suits under Washington's dissolution statute are fundamentally equitable in nature. *Henry George & Sons*, 95 Wn.2d at 952. Relying on this equitable nature, both Oregon's Supreme Court and Missouri's Court of Appeals stated that the court may consider alternative equitable relief besides dissolution. *Fix*, 538 S.W.2d at 357. In *Baker*, the

court summarized the equitable remedies that various jurisdictions had used depending on the facts of the case, the most relevant of which include:

> (a) The entry of an order requiring dissolution . . . at a specified future date, to become effective only in the event that the stockholders fail to resolve their differences prior to that date;
>
> (b) The appointment of a receiver, not for the purposes of dissolution, but to continue the operation of the corporation for the benefit of all the stockholders, both majority and minority, until all differences are resolved or "oppressive" conduct ceases;
>
> (c) The appointment of a "special fiscal agent" to report to the court relating to the continued operation of the corporation, as a protection to its minority stockholders, and the retention of jurisdiction of the case by the court for that purpose;
>
> (d) The retention of jurisdiction of the case by the court for the protection of the minority stockholders without appointment of a receiver or "special fiscal agent";
>
> (e) The ordering of an accounting by the majority in control of the corporation for funds alleged to have been misappropriated;
>
> . . . .
>
> (j) An award of damages to minority stockholders as compensation for any injury suffered by them as the result of "oppressive" conduct by the majority in control of the corporation.

Baker, 264 Or. at 632-33 (footnotes omitted); see also *Fix*, 538 S.W.2d at 357 n.3; *Sauer v. Moffitt*, 363 N.W.2d 269, 274-75 (Iowa Ct. App. 1984) (allowing courts ability to provide other equitable remedies pursuant to former Iowa Code § 496A.94(1) (now Iowa Code § 490.1430 (2002)), which is essentially the same as Washington's). Accordingly, alternative remedies are available that are far less severe than dissolution.

We believe that this Court likewise has inherent authority to grant equitable relief short of a dissolution, for example, the Court could order dissolution at a date in the future, if in the meantime the Corporation does not redeem Plaintiff's shares for their fair market value, which

could, and should be accomplished by a tax free reorganization, spin-off to Plaintiff of 37% of the corporate assets.

CONCLUSION

The many year history of oppression, for which the defense concedes evidence is available, creates a material issue of fact whether the Corporation is being threatened with irreparable harm thereby. The defense motion for summary judgment should be denied.

DATED: This 10th day of February 2010.

Esser & Sandberg, PLLC

By _____
Timothy Esser #6770

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of February 2010, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Merlyn W. Clark Hawley, Troxell, Ennis & Hawley P.O. Box 1617 Boise, ID 83701-1617	XX U.S. Mail, Postage Prepaid XX Email– mclark@hawleytroxell.com ____ Telecopy
Charles F. McDevitt and Dean Miller McDevitt & Miller, LLP P.O. Box 2564 Boise, ID 83702	XX U.S. Mail, Postage Prepaid XX Email- chas@mcdevitt-miller.com ____ Telecopy -
Michael McNichols Clements, Brown McNichols, P.A. P.O. Box 1510 Lewiston, ID 83501	XX U.S. Mail, Postage Prepaid XX Email- mmcnichols@clbrmc.com ____ Telecopy

_____
Timothy Esser

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,

Plaintiff,

v.

WILLIAM V. McCANN, JR., and GARY E. MEISNER, individually as a director of McCann Ranch Livestock Company, Inc., and as a shareholder of McCann Ranch & Livestock, Inc., in his capacity as Trustee of the William V. McCann, Sr. Stock Trust,

Defendants,

McCANN RANCH & LIVESTOCK COMPANY, INC.,

Nominal Defendant.

No. CV08-01226

AFFIDAVIT OF DENNIS R. REINSTEIN, CPA/ABV, ASA, CVA

STATE OF IDAHO)
: ss
County of Ada)

Dennis R. Reinstein, being first duly sworn on oath deposes and says:

1. Identity of Expert/Experience. I am a certified public accountant licensed in the State of Idaho and have been continuously so licensed since 1976. I am a principal in the Boise firm of Hooper Cornell, PLLC. My experience and training is set forth on my resume attached. I am over the age of 18, am competent to testify to the matters as set forth below and I have personal knowledge of those matters.

2. Material Reviewed. At the request of Plaintiff's attorney, I have reviewed all the financial material provided by the Corporation, including the state and federal income tax returns, trial balances, income statements and balance sheets from 1996 through 2008, the 706 estate tax return for the William McCann, Sr. Estate, the general ledgers for the years 2001 through 2008, the QuickBooks records since 2004, minutes of the shareholder and director meetings, as provided since 1997, corporate resolutions for these years, the Articles of Incorporation and Bylaws of the Corporation, the work papers of Dorothy Snowball, as provided, including the supplemental papers per the Court's order and other documents provided by Defendants. I have reviewed the deposition testimony of William McCann, Jr., Gary Meisner, Lori McCann, Gertrude McCann and Dorothy Snowball. I have also reviewed the summary judgment affidavits recently filed by the defense, those of Gary Meisner, Dorothy Snowball and William McCann, Jr. and James Schoff.

3. Karen A. Ginnett. Karen A. Ginnett, an experienced CPA in my firm, has worked with me on this case.

4. Corporation's Transactions with Gertrude McCann. We have reviewed the Corporation's transactions with Gertrude McCann. The history thereof is set forth in the minutes

of the meetings of the corporate directors, corporate resolutions and the financial records of the corporation. The facts as I understand them are as follows:

4.1. Gertrude McCann Compensation. The minutes of the September 6, 2000, Board of Directors meeting state:

> A. Gertrude McCann Compensation . . . has been employed by the Corporation as a consultant since the death of her husband, the founder of the Corporation, on October 27, 1997.
>
> President McCann then advised the Board that the Shareholders, in a meeting earlier on the same date, had passed by a 2-1 vote a Resolution recommending the Board of Trustees pay a lifetime annuity to A. Gertrude McCann and as deferred compensation for the services that she and William V. McCann, Sr., had provided to the Corporation for minimal consideration since the Corporation's inception on July 2, 1974.
>
> . . . .
>
> WHEREAS, Corporate Counsel, Cumer L. Green, has advised the Board that inasmuch as one Shareholder voted against that Resolution, to-wit Ronald R. McCann, that there might be certain exposure to the Directors should such compensation program be instituted; and
>
> . . . .
>
> NOW THEREFORE, BE IT RESOLVED that the Board of Directors of McCann Ranch and Livestock, Inc. decline to approve the recommendation of the Shareholders or to authorize payment of a deferred compensation annuity to A. Gertrude McCann.
>
> . . . .
>
> BE IT RESOLVED that the Corporation shall terminate the current consulting arrangement with and discontinue making compensation payments to A. Gertrude McCann and to initiate such reasonable action as shall be necessary to determine if any ultra vires compensation has been paid to A. Gertrude McCann and if so, to secure or recover for the Corporation such payments, if any there be, from A. Gertrude McCann, who is now 84 years of age.

4.2. Advances for Expenses. Beginning before 2001 and continuing since, the Corporation has routinely paid personal expenses for Gertrude McCann, including, but not limited to, utilities, insurance and automobile expenses. At the end of each year, the Corporation's accountant, Dorothy Snowball, increases the account receivable due from Gertrude McCann for an estimated amount for some of these expenses and calculates interest on the balance of the receivable at year end. The Corporation deducts the balance of the expenses on its tax returns. As noted in the Affidavit of Dorothy Snowball, the December 31, 2005 balance, including interest, was $165,341. With further advances and interest, the Corporation's books report the balance of Gertrude McCann's account receivable to be $198,945 as of December 31, 2008.

4.3. Purchase of Residence. Pursuant to a sales agreement dated December 27, 2000, the Corporation agreed to purchase Gertrude McCann's home for the sum of $310,000. The contract called for $40,000 to be paid at closing, the balance to be paid in monthly installments of $5,000 including interest at 7½%. As part of the agreement, the Corporation provided a life estate to Gertrude McCann who was 84 years old at the time. The Corporation further agreed to pay the utilities, taxes, insurance and maintenance.

According to William McCann's affidavit, "the Corporation paid her the fair market value of the property purchased." This is consistent with his deposition testimony in which he stated at pages 87-88:

> Q. So, the corporation bought your mother's house in order to get money to her?
> A. She needed money to live on.
> Q. Okay. You didn't take advantage of her in the price, did you?
> A. I have never taken advantage of her.
> Q. So you didn't get more value for the corporation that what you paid out?
> A. It was considered fair market value when the deal was put together.

. . . .

Q. So, the corporation has paid out this money to get her cash, and, in the meantime, the corporation is not getting any benefit from it?
A. I think they are getting benefit. I believe it's appreciating as real estate appreciates.
Q. Okay. What's its worth today?
A. I don't know.
Q. But the corp – the house is not producing any income for the corporation?
A. That's correct.

At page 84, Mr. McCann testified:

Q. Why did the corporation buy her house?
A. Because she needed money.

4.4. House Maintenance. As part of the purchase of the family home, the Corporation agreed to pay Gertrude McCann $400 per month to maintain the property. According to a March 2, 2009 corporate resolution, the $400 per month maintenance payment was increased to $500 per month on November 15, 2006, and again increased to the amount of $1,000 per month on June 1, 2007.

4.5. Hired Man. In addition to the monthly maintenance payment to Gertrude McCann, on May 24, 2007, the Corporation agreed to provide, at its expense, a hired hand to perform maintenance and repairs on the property for Gertrude McCann.

4.6. Advances from Bill and Lori McCann. By 2007 the Corporation's payments to Gertrude McCann for her house had been completed. William McCann, Jr. and Lori McCann agreed to deposit $1,500 a month into her checking account beginning on May 17, 2007.

I have asked Plaintiff's attorneys to ascertain what amount William McCann, Jr. and/or his wife, Lori, assert is owed to them by Gertrude McCann and/or the Trust for which she is the beneficiary. I am informed that they have refused to provide that discovery. I expect that the

amount claimed owing to William McCann, Jr. and Lori McCann will compete with the amount purportedly owed by Gertrude McCann to the Corporation.

4.7. 2006 Promissory Notes. By Corporate resolution dated July 2006, the Corporation resolved that it would execute and deliver a promissory note dated January 1, 2006, in the principal amount of $106,000 payable to the order of Gertrude McCann, in exchange for a promissory note from Gertrude McCann in the principal amount of $165,341, also to be dated January 1, 2006. The note from Gertrude McCann to the Corporation represents the advances made to her and those to her late husband. Gertrude McCann testified that she does not owe the Corporation any money, nor did she even acknowledge the existence, let alone validity, of the promissory note she purportedly owes.

An amortization schedule for each of the notes disclosed that despite the substantial difference between the principal amounts owed, the Corporation would pay Gertrude McCann $191,711, including interest, and she would pay the Corporation $192,111, the payments to be made over the next five years.

Even though the resolution called for both notes to be dated January 1, 2006, the Corporate note, in the principal amount of $106,000, was back dated to August 1, 2000. The reason for the notes, according to the Resolution, is:

> The Corporation is indebted to Gertrude McCann for rental of real property for a period of 12½ years to August 1, 2001, in the sum of $106,000, plus interest accruing after August 1, 2000 at the rate of 7.5% per annum, and Gertrude is indebted to the Corporation for various payments made to and on her behalf, in the sum of $165,341.49 as of December 31, 2005, with interest accruing at the rate of 5½% per annum. And, whereas the Corporation has recently completed the purchase of certain real property with Gertrude McCann and, whereas the Corporation's accountant has recommended that these obligations be evidenced by promissory notes and that they be amortized over five years.

I have been provided no documentation or deposition testimony that would suggest that Gertrude McCann claimed to be owed anything for this alleged past due rental. I have been provided no evidence of a writing (other than the Corporate Resolution) that would support this liability that purportedly extends for some twelve years previous to the year 2000 decision.

The promissory note from Gertrude McCann to the Corporation is reported as an asset on the Corporation's books and in its financial statements. The promissory note from the Corporation to Gertrude McCann has never been reported as a liability of the Corporation in its books and records or on its financial statements. Ms. Snowball states in her affidavit that she "was waiting until Gertrude and the Corporation traded checks," at which time she "would post the payment as deductible rent expense of the Corporation." Waiting until payment is made is not the proper accounting treatment for a liability of a corporation. Liabilities should be reported when incurred regardless of whether or not a deductible expense has occurred for tax purposes.

5. Opinions. Based upon our investigation, I express the following opinions which I hold to a reasonable degree of certainty based upon my personal knowledge, experience and training as an accountant, and upon information that certified public accountants typically and reasonably rely upon in forming such opinions.

5.1. In my opinion, the financial transactions the Corporation has engaged in with Gertrude McCann, were not in furtherance of the ordinary and necessary business purposes of the Corporation, but were designed as a means to support her lifestyle as an alternative to declaring dividends and/or redeeming Corporate stock from the Trust to which she is a beneficiary.

5.2. Plaintiff's counsel has asked me to assume that an appropriate definition of "threat of irreparable harm" is twofold: 1) harm that cannot be repaired, e.g., a loss of money

that cannot be recouped; and 2) that the harm is of a significant amount. Utilizing this definition, in my opinion, the transactions between the Corporation and Gertrude McCann threaten the Corporation with irreparable harm in at least two ways:

First, they create the potential for the taxing authorities to reclassify these transactions as disguised dividends. This could result in substantial taxes, interest and penalties being assessed against the Corporation, and possibly the William V. McCann, Sr. Stock Trust and/or Gertrude McCann.

Second, there is a receivable from Gertrude McCann owing to the Corporation increasing in both principal and accruing interest, from which amounts due to the Corporation may never be collected.

6. Analysis / Material Facts which Support Opinions.

6.1. If the business affairs of the Corporation were selected for audit by either the Idaho State Tax Commission or the Internal Revenue Service, such audit would evaluate whether the transactions between the Corporation and Gertrude McCann were ordinary and necessary business expenses. I believe that on a more likely than not basis, such an audit would find that these transactions were not for an ordinary and necessary business purposes and therefore would not be allowable deductions under the tax code.

6.2. The deposition testimony of Gary Meisner and William McCann, Jr. reveals that they are unaware of what assets Gertrude McCann has and they are unable to identify assets from which she or her estate can repay the Corporation.

6.3. If the Corporation paid Gertrude McCann the fair market value for her home, it in fact received in return substantially less value than what it paid. At the date of the purchase Gertrude McCann was 84 years old and received a life estate. The value of property

subject to a life estate can be divided between the life estate and remainder interest utilizing IRS Table S. Application of this table provides that, at the date of the purchase of her home for $310,000, the value of the life estate Gertrude McCann received was $102,598 and the value of the remainder interest to the Corporation was $207,402.

Further, as I understand a life estate, the life tenant retains rights and obligations related to the property until the grantee's rights terminate. The fact that the grantor Corporation is paying expenses related to the property further magnifies their over payment of value.

6.4. According to the defense summary judgment affidavits, the lack of dividends is justified by the insufficient cash flow available to the Corporation. In response, I assert that the cash flow made available to Gertrude McCann could have been utilized for dividends.

6.4.1. Attached as Exhibit A is an itemization of the cash flow provided by the Corporation for the benefit of Gertrude McCann since January 1, 2001 and for other reasons. While a portion of the net income was utilized to repay Corporate debt, it is clear that had the transactions with Gertrude McCann not been engaged in, the Corporation would have had funds available to pay dividends.

6.5. In Paragraph 26 of Dorothy Snowball's affidavit she asserts that corporate dissolution would have "potentially devastating tax consequences to the corporation and shareholders."

6.5.1. When a corporation sells assets for an amount greater than their depreciated book value, the corporation faces a capital gain tax on the difference. If the corporation then distributes the proceeds of the sale to its shareholders, they face tax on this dividend income. This potential double tax is not a penalty, it is a tax that a C-Corporation and

its shareholders eventually face unless the corporation maintains perpetual existence and does not sell its assets and/or distribute dividends. The double tax could have been avoided, so that there would only be a tax at the shareholder level, had the corporate directors elected to have the corporation taxed as an S-Corporation and the S-Corporation requirements were met. This was not done.

6.5.2. These alleged "potentially devastating" taxes could be avoided if a court ordered dissolution was accomplished by means of a tax free re-organization – a spin-off. Simply put, if whatever share of the corporate assets that should be distributed to Ron McCann were distributed to a subsidiary corporation, then Ron McCann's stock in the parent corporation were exchanged for the stock in this newly formed subsidiary corporation, he would then own (control) those assets. This would avoid "devastating tax consequences."

DATED: This 9th day of February, 2010.

Dennis R. Reinstein, CPA/ABV, ASA, CVA

Subscribed and sworn to before me this 9th day of February, 2010.

JENNIFER HANEY NOTARY PUBLIC STATE OF IDAHO

Notary Public for the State of Idaho
My commission expires: 9/26/2014

McCANN v. McCANN
McCann Ranch Company
Cash Flow Analysis

SUMMARY

EXHIBIT A

	12/31/01	12/31/02	12/31/03	12/31/04	12/31/05	12/31/06	12/31/07	12/31/08	5/28/09
ADJUSTED CASH AT END OF YEAR	$15,496	$33,343	$71,780	$98,342	$53,975	$158,406	$119,871	$44,078	$45,284
Add:									
Payments to/on behalf of Gertrude McCann	88,877	83,452	89,506	90,278	90,460	58,957	47,915	57,275	15,586
Legal Fees	0	0	0	245	557	2,216	44,247	89,062	39,526
CASH AVAILABLE TO PAY DIVIDENDS	104,373	116,794	161,286	188,865	144,991	219,579	212,033	190,415	100,3
Less:									
Dividends paid	0	0	0	(10,000)	0	0	(25,000)	(35,000)	0
CASH AVAILABLE	$104,373	$116,794	$161,286	$178,865	$144,991	$219,579	$187,033	$155,415	$100,396

AFFIDAVIT OF DENNIS R. REINSTEIN

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McCANN v. McCANN

DETAILS

EXHIBIT A-1

McCann Ranch Company
Cash Flow Analysis

	12/31/01	12/31/02	12/31/03	12/31/04	12/31/05	12/31/06	12/31/07	12/31/08	5/28/09
CASH FLOWS FROM OPERATING ACTIVITIES									
Net income (loss)	($102,023)	$69,765	$129,160	$23,181	$106,310	$309,067	$75,866	$138,140	$238,446
Adjustments to reconcile net income (loss) to net cash provided by operating activities									
Depreciation	218,520	259,058	279,485	245,320	262,209	278,452	297,936	205,575	
Net change - accumulated depreciation									
Amortization - loan fees				27,455	12,281	12,281	12,281		
(Gain) loss on sale of fixed assets		(3,295)	(1,485)	(5,027)	(1,634)	(23,219)	(16,500)	(12,750)	
(Gain) loss on sale of livestock							(5,191)	(41)	
(Increase) decrease in:									
Miscellaneous receivable			(900)	(100)	675	698	(374)	(1,074)	1,074
Bill Sr. and Gertrude McCann receivables	(11,930)	(8,642)	(9,094)	(9,526)	(10,162)	(10,620)	(10,812)	(12,172)	
Estate of William McCann Sr. loan	(1,171)								
Prepaid commissions	(44,221)			8,373	(8,127)	11,973	4,526	9,160	
Prepaid commissions and loan fees	(26,050)	(11,109)	(10,789)					12,281	
Increase (decrease) in:									
Accounts payable								161	16,449
Rental deposits		200			300				1,500
Accrued liabilities - income and payroll taxes	6,478	(859)	30,139	(29,480)	45,608	108,621	(110,079)	51,370	(33,267)
Deferred gain on involuntary conversion	(18,310)	(6,141)					197,776	(23,831)	
NET CASH PROVIDED (USED) BY OPERATING ACTIVITIES	21,294	298,976	416,516	260,196	407,460	687,255	445,428	366,819	224,201
CASH FLOWS FROM INVESTING ACTIVITIES									
Investment - DA Davidson	(21,898)	14,309	5,837	14	74	(101,973)	44,224	59,120	
Purchase of equipment/building/improvements				(61,023)	(35,488)	(63,755)	(87,860)	(1,303)	(1,249)
Purchase of land				(8,405)					
Purchase of cattle and bulls				(13,450)	(44,417)	(13,875)	(12,090)	(6,700)	(23,815)
Net change - prop, equipment and cattle	(845,093)	(74,407)	(55,619)						
Purchase of horses				(3,500)				(7,500)	
Proceeds from sale of equipment		5,500	18,600			22,000	16,500	12,750	
Proceeds from sale of cattle/bulls	22,697	3,936		6,725	2,733	2,400	5,851		
Proceeds from sale of horses							335	624	
Loan to Gertrude McCann	(44,383)	(44,449)	(47,877)	(51,615)	(55,612)	(27,867)			
Receivable - Luke & Debbie Lowe						(18,000)	9,000	0	9,000
Miscellaneous adjustment				1,547	(148)	(0)	1		
NET CASH PROVIDED (USED) BY INVESTING ACTIVITIES	(888,677)	(95,111)	(79,059)	(129,706)	(132,858)	(201,070)	(24,041)	56,991	(16,064)
CASH FLOWS FROM FINANCING ACTIVITIES									
Banner Bank line of credit					72,000	(72,000)		24,758	19,088
Long term borrowings	849,062	80,000	42,623	5,981,103					
Refinance costs				(135,374)					
Reduction of long term debt	(181,323)	(251,709)	(335,805)	(5,949,670)	(381,044)	(411,726)	(415,699)	(440,241)	(191,019)
NET CASH PROVIDED (USED) BY FINANCING ACTIVITIES	667,739	(171,709)	(293,183)	(103,941)	(309,044)	(483,726)	(415,699)	(415,483)	(171,931)

McCANN v. McCANN
McCann Ranch Company
Cash Flow Analysis

DETAILS

EXHIBIT A-1

	12/31/01	12/31/02	12/31/03	12/31/04	12/31/05	12/31/06	12/31/07	12/31/08	5/28/09
NET INCREASE (DECREASE) IN CASH	(199,644)	32,156	44,275	26,548	(34,442)	2,459	5,688	8,326	36,206
CASH AT BEGINNING OF YEAR	191,864	(7,780)	24,376	68,651	85,200	50,758	53,217	33,905	7,232
CASH AT END OF YEAR	(7,780)	24,376	68,651	95,200	50,758	53,217	58,905	42,232	43,438
Adjustments:									
Cash invested in DA Davidson account	23,276	8,966	3,129	3,143	3,217	105,190	60,966	1,846	1,846
ADJUSTED CASH AT END OF YEAR	**15,496**	**33,343**	**71,780**	**98,342**	**53,975**	**158,406**	**119,871**	**44,078**	**45,284**
Add:									
Monthly payments to Gertrude - repairs & maintenance of Stewart Avenue	4,800		9,600	4,800	5,600	5,500	10,000	13,000	4,000
CASH AVAILABLE	**20,296**	**33,343**	**81,380**	**103,142**	**59,575**	**163,906**	**129,871**	**57,078**	**49,284**
Add:									
Stewart Avenue Expenses - repairs & maintenance, taxes utilities, telephone, Mike Curtis salary	10,345	14,810	10,812	15,952	14,699	14,268	27,103	32,103	11,586
CASH AVAILABLE	**30,641**	**48,153**	**92,192**	**119,094**	**74,274**	**178,174**	**156,974**	**89,181**	**60,870**
Add:									
Increase to Gertrude's account receivable	11,930	8,642	9,094	9,526	10,162	10,620	10,812	12,172	0
CASH AVAILABLE	**42,571**	**56,795**	**101,286**	**128,621**	**84,435**	**188,794**	**167,786**	**101,353**	**60,870**
Add:									
Principal payments on loan to purchase Gertrude's home	44,383	44,449	47,877	51,615	55,612	27,867			
Interest payments on loan to purchase Gertrude's home	17,419	15,491	12,063	8,385	4,388	702			
Escrow fees on loan to purchase Gertrude's home		60	60						
	61,802	60,000	60,000	60,000	60,000	28,569	0	0	0
CASH AVAILABLE	**104,373**	**116,794**	**161,286**	**188,620**	**144,435**	**217,363**	**167,786**	**101,353**	**60,870**
Add:									
Legal fees				245	557	2,216	44,247	89,062	39,526
CASH AVAILABLE TO PAY DIVIDENDS	**104,373**	**116,794**	**161,286**	**188,865**	**144,991**	**219,579**	**212,033**	**190,415**	**100,396**
Dividends paid				(10,000)			(25,000)	(35,000)	
CASH AVAILABLE	**$104,373**	**$116,794**	**$161,286**	**$178,865**	**$144,991**	**$219,579**	**$187,033**	**$155,415**	**$100,396**

AFFIDAVIT OF DENNIS R. REINSTEIN

DENNIS R. REINSTEIN, CPA/ABV, ASA, CVA

Birthdate: [redacted]

Education: University of Idaho
BS Agri-business, 1974
BS Business (Accounting), 1975

Certification: Licensed in Idaho as CPA, 1976
CVA designation, 1995
ABV designation, 2001
ASA designation, 2003

Career Experience: Hooper Cornell, PLLC

Partner — January, 2002 - Present

Presnell·Gage Accounting & Consulting

Firm-wide supervisory responsibilities for business consulting services and electronic data processing services

Boise office	
Partner	January, 1996 - December 31, 2001
Partner-in-charge	October, 1991 - January, 1996
Partner	July, 1989 - September, 1991
Moscow office	
Partner-in-charge	October, 1983 - June, 1989
Lewiston office	
Partner	May, 1980 - September, 1983
Manager	1979 - 1980
Staff Accountant	1975 - 1978

Professional experience includes:

(1) Valuation of small businesses and professional practices.
(2) Assistance to clients with the analysis of business operations and significant business transactions. These include negotiations on purchase and sale of a business or business segments, including assistance with valuation of business entities.
(3) Design and assist with implementation of financial accounting and control systems for various clients served by the firm.
(4) Supervision of accounting and auditing services provided by the firm's professional staff and consultation on procedures and methods of providing client services.
(5) Member of team conducting review of complex mainframe and microcomputer accounting systems.
(6) Co-authored and presented eight-hour course on cash management. Presented other client educational seminars and seminars to other service professionals such as bankers and attorneys.
(7) Duties as a partner-in-charge included the responsibility for managing an office and personnel in accordance with firm policies.

Career Experience continued:

Farmer's Home Administration - Assistant County Supervisor, 1974.
Duties included:
(1) Evaluation of credit applications and preparation of application packages for review and approval.
(2) Residential real estate and farm appraisals.

Professional Memberships and Activities:

Idaho Society of CPAs, member
Chairman of Management of an Accounting Practice Committee
Member of Committees on
Public Relations
Continuing Professional Education
Relations with Bankers
Northern Chapter of Idaho Society of CPAs, president
American Institute of CPAs, member
American Society of Appraisers, member - Business Valuation
National Association of Certified Valuation Analysts, member
The Institute of Business Appraisers, member
Continental Association of CPAs, Past Chair of Litigation Services Committee and Information Technology Committee
Boise Estate Planning Council, member, Treasurer
Past Program Chairman

Public Service and Community Activities:

Boise Chamber of Commerce
Member of Small Business Recognition Sub-committee
Member of Small Business Education and Advisory Sub-committee
Chair of Small Business Committee
Member of Garden City Chamber Council
Discovery Center of Idaho, Vice President of Board
Kiwanis
Moscow Chamber of Commerce
Past-President, V. Pres. Treasurer & Board member
Moscow Executive Association
Moscow Rotary
Lewiston Chamber of Commerce
Lewiston Jaycees
Held various offices & a member of Board of Directors
Prepared and presented accounting seminars for Human Advancement's Inc., Minority Contractors Awareness Seminars and the Lewis-Clark Homebuilders Association.
Taught night classes in bookkeeping at the Clarkston Branch of Walla Walla Community College.

QUALIFICATIONS

See curriculum vitae attached.

COMPENSATION

Hourly rate of $295 plus out-of-pocket costs.

PUBLICATIONS/PRESENTATIONS

The following is a list of publications I have authored or co-authored over the last 10 years.

1) Selling Your Business – Non-Family Valuation and Tax Issues, presented to the National Auctioneers Association – 52nd Auctioneers Conference and Show on July 20, 2001.

2) Litigation Questions, Problems & Solutions: The Bench, Bar and Clients Speak Out. Participant on the client panel – presented to the Idaho State Bar Litigation Section on January 10, 2003.

3) Using Business Valuations To Build An Estate – presented to the Boise Estate Planning Council on November 3, 2003.

4) Business Valuation Basics – presented to the Boise Wells Fargo Business Bankers meeting on December 5, 2003.

5) Business Valuation Basics: How to Use Valuation/Financial Theory to Increase the Value of Your Business – presented to TechHelp, Manufacturers Luncheon on January 28, 2005.

6) Tax Planning for Sales of Real Estate – sponsored by Premier Alliance on March 16, 2005.

7) Valuation and Credit Analysis: Similarities and Differences – presented to Boise area U.S. Bank business bankers on May 11, 2005.

8) The Guideline Publicly Traded Company Method and The Market Value of "invested" Capital: Should Market Value of "Stakeholder" Capital be the Appropriate Reference – Business Valuation Review; Summer, 2006.

9) A Hybrid Restricted Stock/Pre-IPO Data Point: Lack of Marketability Discount for ESOP's. – Business Valuation Review; Summer, 2007.

10) Pension Plans and Closely-Held Companies: Valuing Tricky Assets in Divorce – presented to the Idaho State Bar Association on May 9, 2008.

11) Co-presenter on damages in Personal Injury litigation to various Treasure Valley area law firms – 2009

PRIOR DEPOSITION OR TRIAL TESTIMONY

The following is a list of cases in which I have given testimony in either deposition or at trial in the last four years.

1) Ray Martin and Robert & Lois Short v. Shirley S. Grant

Deposition – Boise, Idaho - February 2006

2) Idaho State Department of Agriculture v. TFM, LLC, et al.

Deposition – Boise, Idaho – February 2006
Deposition – Boise, Idaho – April 2006

3) Richard Gomez v. Mastec North America, Inc., et al.

Deposition – Boise, Idaho – February 2006
Trial – Boise, Idaho – August 2006

4) United States Bankruptcy Court
In re: Steven Paul Cady and Connie Jean Cady

Trial – Boise, Idaho – August 2006

5) Roy Hall v. Glenns Ferry Grazing Association

Trial – Boise, Idaho – August 2006

6) MSN Communications, Inc. v. CompuNet, Inc., et al.

Deposition – Boise, Idaho – October 2006

7) Serenic Software, Inc. v. Protean Technologies, Inc., et al.

Deposition – Boise, Idaho – October 2006

8) Shannon L. Allison, et al., v. Daniel R. Torrez et al.

Deposition – Boise, Idaho – November 2006

9) Chris Matey, et al., v. Ford Motor Company et al.

Deposition – Boise, Idaho – November 2006

10) Michael P. Fisher, et al., v. Christian Cusimano, et al.

Deposition – Boise, Idaho – March 2007

11) Saint Alphonsus Diversified Care, Inc. v. MRI Associates, LLP

Deposition – Boise, Idaho – June 2007

12) Idaho State Department of Agriculture v. Wheatland Agribusiness, Inc., et al.

Deposition – Boise, Idaho – April 2008

13) J.R. Simplot Company v. Nestle USA, Inc.

Deposition – Boise, Idaho – May 2008

14) United States of America ex rel. Cherri Suter and Melinda Harmer v. National Rehab Partners Inc. and Magic Valley Regional Medical Center

Deposition – Boise, Idaho – August 2008

15) Hobson Fabricating Corp. v. SE/Z Construction, LLC, et al.

Deposition – Boise, Idaho – September 2008

16) George C. Turner. v. Russell E. and Victoria F. Turner

Trial – Murphy, Idaho – July 2009

17) Ronald R. McCann. v. William V. McCann, Jr., et al

Hearing on Motion to Compel – Boise, Idaho – August 2009

18) Darel Hardenbrook, et al. v. United Parcel Service, Co.

Trial – Boise, Idaho – January 2010

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,

Plaintiff,

v.

WILLIAM V. McCANN, JR., and GARY E. MEISNER, individually as a director of McCann Ranch Livestock Company, Inc., and as a shareholder of McCann Ranch & Livestock, Inc., in his capacity as Trustee of the William V. McCann, Sr. Stock Trust,

Defendants,

McCANN RANCH & LIVESTOCK COMPANY, INC.,

Nominal Defendant.

No. CV08-01226

AFFIDAVIT OF KAREN A. GINNETT, CPA, CFE, MST

STATE OF IDAHO)
: ss
County of Ada)

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Karen A. Ginnett, being first duly sworn on oath deposes and says:

1. I am a certified public accountant licensed in the State of Idaho and have been continuously so licensed since 1996. I am a manager in the Boise firm of Hooper Cornell, PLLC. My experience and training is set forth on my resume attached, and includes working for the Idaho State Tax Commission for seven years as an auditor. I am over the age of 18, am competent to testify to the matters as set forth below and I have personal knowledge of those matters.

2. I have assisted Dennis Reinstein in this matter and have reviewed all the material mentioned in his affidavit. I share his opinions. I specifically respond to assertions made in Paragraphs 16 and 17 of Dorothy Snowball's affidavit to the effect that the amounts paid to Gertrude McCann are:

> Legitimate expenses of the corporation and do not expose the corporation to any risk of liability for tax fraud .... Neither the Idaho State Tax Commission or the IRS have ever objected to the amount of compensation paid to William McCann, Jr. or the payments to Gertrude McCann . . . . In fact, in all the years I have been serving as accountant for the corporation and preparing its tax returns, neither the IRS nor the State of Idaho have questioned any deductions taken by the corporation or any returns filed by the corporation.

3. Ms. Snowball states that the expenses paid to Gertrude McCann are legitimate expenses of the Corporation which do not expose the Corporation to any risk of liability for tax fraud. The term "fraud" as used in the tax law, means an actual and deliberate, or willful, wrongdoing with the specific intent to evade tax believed to be owed. The existence of fraud is a question of fact to be determined on a case by case basis considering the entire record of transactions. Fraudulent intent can seldom be established by a single act. The Tax Court in *Schmitz, John Noehl*, (1983) TC Memo 1983-482, set out three elements of fraud: (1) a knowing falsehood; (2) an underpayment of tax; and (3) an intent to evade tax. It is important to

understand that the tax evasion motive need not be the only motive or even the principal motive for the transaction(s), as long as it is a motive.

The deductions claimed on the Corporation's tax returns for questionable payments to Gertrude McCann and a portion of her personal expenses may be viewed as a way to avoid paying tax and therefore tax evasion. The assessment of the civil fraud penalty would be available to the auditor.

4. Ms. Snowball's affidavit indicates that neither the IRS nor the State of Idaho has audited the Corporation since approximately 1986/87. To the extent Ms. Snowball's affidavit could be read to infer that the taxing authorities have approved these transactions – that is simply inaccurate. According to Ms. Snowball's affidavit, the taxing authorities have never reviewed the post-January 5, 2001, transactions between the Corporation and Gertrude McCann. It appears that during the 1986/1987 audit, the taxing authorities did review the transactions between the Corporation and one of its principals, specifically William McCann, Sr., and found that the Corporation was improperly deducting as business expenses the personal expenses of Mr. McCann, Sr.

5. Ms. Snowball appears to reconcile the deduction of some of the payments to Gertrude McCann on the Corporation tax returns by stating that "Gertrude McCann receives a 1099-MISC each year...and she pays tax on that income." The Corporation and Gertrude McCann are two separate entities for tax purposes. The fact that Gertrude McCann reports some income on her tax return does not change the question as to the legitimacy of deducting these payments as business expenses of the Corporation. If an expense is not deemed to be ordinary and necessary under Section 162 of the Internal Revenue Code, the fact that Gertrude McCann

has reported some of the payments as income will not affect the denial of the deduction on the Corporate return.

6. It is my opinion, and for the reasons set forth in detail in Dennis Reinstein's affidavit, the financial transactions that the Corporation has engaged in since January 5, 2001 with Gertrude McCann do expose the Corporation to substantial liabilities in the event of an audit. Simply put, the Corporation is lucky that it has not been audited and had these questionable transactions reviewed. These transactions create a threat of additional taxes and assessment of interest and penalties which threaten harm to the Corporation.

DATED: This 8 day of FEBRUARY, 2010.

Karen A. Ginnett, CPA, CFE, MST

Subscribed and sworn to before me this 8th day of February, 2010.

JENNIFER HANEY NOTARY PUBLIC STATE OF IDAHO

Notary Public for the State of Idaho.
My commission expires: 9/26/2014

Education: University of Maryland - B.S. Business Management/Accounting
Golden Gate University - M.S. Taxation

Certification: CPA, Licensed in Idaho
Certified Fraud Examiner (CFE), 2008

Career Experience:

Hooper Cornell, P.L.L.C.
Manager, January, 2008 - Present
SuperValu, Inc.
Income Tax Manager, November 2006 - November 2007
Bauknight, Pietras & Stormer, P.A.
Tax Manager, November 2005 - October 2006
Idaho State Tax Commission
Income Tax Auditor, 2003 - 2005
Nexus Unit Supervisor, 1998 - 2003
Tax Policy Specialist, 1998
Public Accounting
Staff Accountant to Manager, 1980 - 1997

Professional experience includes:

- Fraud related investigations for private companies and governmental agencies.
- Litigation support projects including personal injury losses, lost wages, wrongful death, lost business profits and contract breach. Support services include research, data analysis, economic loss calculation, and computation of future and present values.
- Investigation of out of state businesses to determine and enforce compliance with Idaho state income and sales tax laws.
- Auditor of income tax returns filed by individuals and businesses.
- Preparation and review of business and individual income tax returns.
- Tax research and planning.
- Preparation of audited, reviewed and compiled financial statements.
- Assisting businesses in establishment and implementation of accounting systems and control.
- Speaker at various tax related seminars.

Professional Memberships and Activities:

Association of Certified Fraud Examiners
Boise Chapter of Certified Fraud Examiners
American Institute of Certified Public Accountants
Idaho State Society of Certified Public Accountants

PRIOR DEPOSITION OR TRIAL TESTIMONY

The following is a list of cases in which I have given testimony in either deposition or at trial in the last four years.

1) James E. Hawe and Tamara J. Hawe v. Van Hees Properties, LLC; Hark's Corner, Inc. - Case No. CV-PI-0704871

   Trial - Ada County, Boise, Idaho - June 2009

2) William O. Goodrich and Khuy V. Goodrich v. Jeffrey Sadler, Edward G. Rainford, and Clear Wealth, Inc. - Case No. CV-OC-0911997

   Deposition - Boise, Idaho - January 2010

QUALIFICATIONS

See curriculum vitae attached.

COMPENSATION

Hourly rate of $160 plus out-of-pocket costs.

PUBLICATIONS/PRESENTATIONS

1) Idaho Additions and Subtractions - presented to the Idaho State Tax Commission Income Tax Audit Bureau in August 2000.

2) Nexus - presented to the Idaho State Tax Commission Income Tax Audit Bureau on April 22, 2000.

3) Entity Overview - presented to the Idaho State Tax Commission Income Tax Audit Bureau on October 1, 2003.

4) Co-presenter on damages in Personal Injury litigation to various Boise law firms – 2009.

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,

Plaintiff,

v.

WILLIAM V. McCANN, JR., and GARY E. MEISNER, individually as a director of McCann Ranch Livestock Company, Inc., and as a shareholder of McCann Ranch & Livestock, Inc., in his capacity as Trustee of the William V. McCann, Sr. Stock Trust,

Defendants,

McCANN RANCH & LIVESTOCK COMPANY, INC.,

Nominal Defendant.

No. CV08-01226

AFFIDAVIT OF RONALD McCANN

STATE OF WASHINGTON)
: ss
County of Whitman)

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Ronald McCann, being first duly sworn on oath deposes and says:

1. I am the plaintiff in this action. I am over the age of 18, am competent to testify to the matters as set forth below and I have personal knowledge of those matters.

2. I note that according to the defense summary judgment affidavits, the Corporation has spent $250,000 in defending my complaint which alleges oppression, and further, they concede that for purposes of their motion that I have been oppressed. The fact is that if the Defendant controlling directors/shareholders had not engaged in the pattern of oppression I complain of, I would not have brought this lawsuit. If I were not oppressed, the Corporation would not have squandered $250,000 in needless litigation expenses.

3. When the Corporation was formed, and then 36.68% of its stock gifted to me and a like amount to my brother, it was my understanding that this was done as an inheritance device – that would allow our father to transfer real estate to us. And the real estate the Corporation owns today is the same real estate it owned when it was formed. Today, the Corporation has timber/cattle pasture ground and a cattle operation, the same as at the time it was formed. In other words, if I was to receive 36.68% of the corporate assets in existence today, I would be receiving what I would have received had the Corporation not been formed and my father had simply left me that percentage of his estate. Gertrude McCann, my mother, has stated in her deposition that she does not owe the Corporation anything. As a natural heir of Gertrude McCann, I will use her statement to oppose any effort by the Corporation to recover any amounts it claims it is owed from her estate. The alternative would be for the Corporation, fully controlled by my brother after my mother's death, to assert a creditor claim in her estate. If successful, that would result in me not receiving my expected inheritance from my mother. And so far, because of the oppression of Defendants, I have not received the fruits of my

father's intended inheritance to me. I attach pages 6-9, 14-17, 38-41 and 46-49 of Gertrude McCann's deposition.

4. I also believe that it is unlikely the Corporation can recover from my mother's estate what it purports to be owed given that I believe her estate consists of not much more than 100 acres of ground near Craigmont. She has little in the way of other assets – she essentially spends her cash flow. As my brother testified at his deposition, he caused these transfers because she needed the money.

5. I attached a true copy of the Minutes of the September 6, 2000, Board of Directors meeting. Despite the resolution set forth therein, that the Corporation would recover the ultra vires compensation paid to my mother (the phony consulting fees) the Corporation has recovered nothing from my mother nor has it made any effort to do so.

DATED: This 10 day of February 2010.

Ronald R. McCann

Ronald McCann

Subscribed and sworn to before me this 10 day of February 2010.

Notary Public for the State of Washington
My commission expires:_____

TIMOTHY ESSER
STATE OF WASHINGTON
NOTARY PUBLIC
MY COMMISSION EXPIRES
12-01-12

WEDNESDAY, JULY 15, 2009 - 9:04 A.M.

Thereupon,

GERTRUDE McCANN,

a witness of lawful age, having first been duly sworn upon her oath to tell the truth, the whole truth and nothing but the truth, testified as follows:

EXAMINATION

BY MR. ESSER:

Q. Mrs. McCann, how old are you?

A. Ninety-three.

Q. Now, do you have anybody that helps you with your daily life?

A. I have a hired man.

Q. What's he do?

A. He works.

Q. Does he -- what kind of work does he do for you?

A. I live on thirty-five acres, so there's lots of work to be done.

Q. So he works outside the house?

A. Certainly.

Q. Does he help with the cooking or the --

A. No, he doesn't.

Q. He doesn't. You take care of everything inside the house?

A. Yes.

Q. How about driving; do you do your own driving?

A. Yes.

Q. Do you have anyone else that helps or works for you?

A. No.

Q. Who pays for this hired hand?

A. McCann Ranch and Livestock.

Q. Okay. How long have you had his services?

A. Probably three years.

Q. Okay. Before that, did you have someone else helping you?

A. Yes, I've always had somebody help me outside.

Q. Okay. Your husband died in 1997. About how many years had you been married when he died?

A. We were married in 1941. You figure it out.

Q. Well, that looks like about fifty-six years, huh?

A. Yeah, something like that.

Q. Okay. What was he doing at the time of his death?

MR. McNICHOLS: I'm going to object on the grounds that I think the court has entered an order that the discovery is to be limited to events that occurred after July 5th of 2001.

MR. ESSER: I don't -- your objection is noted. We'll receive the evidence.

Q. (BY MR. ESSER) What was your husband doing in 1941 [sic]?

A. Farm work.

MR. McNICHOLS: Do you mean to say '41?

Q. (BY MR. ESSER) Excuse me. What was your husband doing at the time of his death? You know, was he active with the corporation? Was he active with the ranch?

MR. McNICHOLS: Same objection, also on the grounds that it's compound. May I have a continuing objection then to everything prior to January 5th of 2001?

MR. ESSER: Certainly. That will make things smoother.

MR. McNICHOLS: Yes. Thank you.

MR. ESSER: Your objection is we can't even ask any questions about anything that occurred before 2001, that's your objection?

MR. McNICHOLS: Unless it has effects or consequences which arise after that time.

MR. ESSER: And I think every question I'm going to ask meets that standard, but we'll deal with that later.

Q. (BY MR. ESSER) Sorry, Mrs. McCann. What was your husband doing workwise shortly before his death, you know, in the year before his death?

A. I don't know. I didn't go with him. I was home working.

Q. (BY MR. ESSER) But was he active in the business?

A. Partly, I suppose.

Q. Okay. At the time you married him, what was he doing, in 1941?

A. He was a farmer.

Q. Okay.

A. And cattleman.

Q. Did he own his own land?

A. No. He worked for his father.

Q. His father was alive when you guys got married?

A. He certainly was.

Q. Okay. And how did you guys support yourself in the early years of your marriage?

A. I guess you would say by working.

Q. In a cattle operation, a farm operation?

A. Yeah.

Q. There -- Bill was born in 1944, I think, and --

A. No, he wasn't.

Q. What year was he born?

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was?
A. No, I don't.
Q. Do you know today where Bill's office is?
A. I certainly do.
Q. Is that where the corporation's office was?
A. I don't know.
Q. The corporation has some commercial properties, doesn't it?
A. As far as I know, they have some, but I don't know where or what.
Q. Do you know when the corporation first started developing commercial properties?
A. No.
Q. Okay. According to the records I've seen, the corporation was formed in 1974.
A. I don't know that even.
Q. Well, assuming that's accurate, I'm -- just for today, I'm telling you that that's accurate. I've seen records that tell me that. I was going to ask you, whose idea was it to form this corporation?
A. I don't know.
Q. Was it your idea?
A. No, it was not my idea. I don't know anything about it.
Q. Do you know why the corporation was formed?

A. No.
Q. Do you know in 1974, if that's when the corporation was formed, maybe you've answered this, but at that point, were there any commercial properties, or was it just cattle and timber and --
A. I don't know.
Q. -- ranch property?
A. I don't know.
Q. You don't know. Who ran the corporation after it was formed?
A. Bill McCann, Senior.
Q. And did he run it pretty much until he died?
A. I think so.
Q. What did you do as far as running the corporation or helping the corporation?
A. Whatever there was to do, I did, for me.
Q. And I'm talking before your husband died.
A. I did --
Q. Okay.
A. -- everything before.
Q. And what --
A. We raised -- we did a lot of things.
Q. Okay.
A. At home.
Q. Like what did you do?

A. We raised chickens. I raised ducks, and I raised, had sheep. I was -- most everything to make money, baby-sit.
Q. And that was at around the family home where you live today?
A. Certainly.
Q. Okay. But in terms of being down at the corporate office, you didn't do that?
A. No, I did not.
Q. In terms of, did you have anything to do with developing commercial real estate?
A. No, I did not.
Q. Okay. Did you have anything to do with running the cattle?
A. No, I didn't.
Q. Did you have anything to do with --
A. Only my own cattle.
Q. Only your own cattle at the home, at the home?
A. (Witness nods head.)
Q. Correct?
A. Yes.
Q. And you have some cows there today, don't you?
A. Yes, I do.
Q. About how many do you have?
A. Eight.

Q. And you've always had cows at home?
A. Yes, I have.
Q. Before your husband died, you know, what did Ron do with the family business operation?
A. I don't know.
Q. What did --
A. I don't remember.
Q. What did Bill do before your husband died?
A. His law office, I guess.
Q. After your husband died, did you do anything to get a job or a different --
A. No, I didn't.
Q. You didn't do anything to get a different --
A. I worked enough during my life that I don't need a job.
Q. Okay. We're going so fast we're going to get done here pretty quick.
A. Well, we better.
Q. Now, you get Social Security, I assume?
A. Yes, I do.
Q. Okay. And you've received financial benefits from the corporation?
A. I don't know that.
Q. Okay. Well, I'll give you some examples, and we'll talk about that. But I'm trying to figure out, do

A. Somebody had to tell me to do that, because I never read it. I don't owe them nothing.
Q. Did Ron tell you to sign that?
A. No, I don't think so. I don't think it was him.
Q. Did Gary Meisner tell you to sign that?
A. I don't know who it was.
Q. Did Bill tell you?
A. When was this?
Q. January 1st, 2006.
A. January '06, three years ago. I don't remember this.
Q. Mrs. McCann, what I'm trying to figure out, if this document means what it says, I'm trying to figure out why you would owe the corporation a hundred and sixty-five thousand dollars?
A. I don't owe them a dime. In my book, I don't owe them nothing. They owe me.
Q. What do they owe you for?
A. Living, living expenses. That's what they owe me for.
Q. And why is that?
A. Because I helped make that.
Q. You helped make the corporation?
A. I helped make what is made.

Q. And do you feel that the corporation is treating you fairly?
A. No.
Q. Here's --
A. Because we have too many expenses and lawsuits to make any money off of that thing.
Q. What are the -- what's the lawsuits about?
A. I don't know. This is the first one I had anything to do with. I don't know anything about them.
Q. What is this lawsuit all about?
A. I don't know. That's what I wonder. I don't do anything to deserve any of this.
Q. Has anybody explained to you what this lawsuit's about?
A. Yes. But I didn't pay any attention.
Q. Who's explained to you what this lawsuit is about?
A. This man right here.
Q. Well, I don't want to know what Mr. Aherin told you. Or I would like to know, but I'm not allowed to ask that. What has Bill, Junior, told you?
A. Bill, Junior, doesn't say anything about it. He respects me.
Q. What's Ron told you about it?
A. Nothing.

Q. Looking at some records of the corporation, I -- I see where the corporation provided benefits to you down through the years, and but I can't tell if they claim that you owe that back to them or not. We haven't been able to figure that out. That's what --
A. I don't owe them a dime.
Q. Okay. What benefits -- does the corporation pay for your car?
A. No, I paid for it myself.
Q. Does the corporation pay for your gas?
A. Yes.
Q. How does -- do you have a credit, a corporate credit card?
A. Yes, I do.
Q. And you can charge gas with it?
A. I do charge gas with it.
Q. Okay. Is it a VISA or a Master Card, what, what is it?
A. I don't know. It gets me there. That's all I care.
Q. Do you have it with you?
A. Yes, I do.
Q. Can I see it, please?
A. It's McCann Ranch and Livestock.
Q. And that's the only thing I'm going to ask for

you to pull out of your wallet, Mrs. McCann.
A. Yeah, that better be.
Q. Now this one says William McCann. It doesn't say the corporation.
A. Well, he's -- he is it.
Q. But that's the one you use?
A. Yes, that's the one I use.
Q. Okay. Can I see it again, please? I want to write down the number.
MR. McNICHOLS: Well, I guess you won't. I guess we don't have to worry about you using it but....
MR. ESSER: I thought you represent the corporation.
MR. SCHWAM: He's worried about you using it.
MR. ESSER: Oh, well, I'm not about to use it.
Q. (BY MR. ESSER) That's the credit card you use to pay for things?
A. That's the only thing I pay for on that is gas.
Q. Gas.
A. I use my own money, what I get.
Q. Do you take trips from time to time?
A. I intend to, too.
Q. And, Sandy Scott helps you with those, booking those and....
A. She is the guide. She is the one that runs

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Q. Do you know why the corporation would owe you a hundred and six thousand?
A. Why not?
Q. But I mean, is there some specific transfer of asset or some specific thing you did? I've heard what you've testified to before, that, that your sons and the corporation, based on the whole history here, have an obligation to you, but I'm --
A. You're right, they do.
Q. But I'm asking, you know, did you sell a valuable asset to the corporation for a hundred and six thousand or did you --
A. I did not. I never sold them anything.
Q. Did you do any specific thing in exchange for a hundred and six thousand? You don't remember?
A. Not to my knowledge.
Q. Do you know what dividends are?
A. Yes.
Q. What are they?
A. I'm not getting any.
Q. Okay. Dividends is income that a corporation kicks out to its shareholders, is that right?
A. Yeah, that's right, and I'm not getting any.
Q. How do you feel about that?
A. Well, I think I would have got some if he

hadn't put that in the meeting where I would be paid just shares and not money. I'd rather have the money and not the shares.
Q. So you think that Ron caused something to occur in one of the director meetings so that you couldn't have dividends; is that correct?
A. That's right, couldn't have monthly payment. Yes, that's right.
Q. Well, I'm about done. I'm going to take a break and --
A. You don't need one; I do.
MR. ESSER: Well, that -- I'm going to take a break.
(Whereupon, the deposition was in recess at 9:56 a.m. and subsequently reconvened at 10:01 a.m.; and the following proceedings were had and entered of record:)
Q. (BY MR. ESSER) Well, we're about done. I thought I asked you this, but they didn't think I was clear enough. What do you do for the corporation today, anything?
A. At my age, what should I do?
Q. I'm assuming you don't do anything for the corporation today, but I just -- you're ninety-three, but is that correct?

A. Yes. I'm ninety-three, working on ninety-four.
Q. Okay. Is it correct you don't do anything for the corporation today?
A. That's right.
Q. Okay. When was the last time you worked for the corporation?
A. I don't know. I don't remember. What do I do for the corporation?
Q. That's what I'm trying to find out. Since you've been eighty-five years old, have you worked for the corporation?
A. I used to fix lunch once in a while for them when they was branding, and that's the only thing I ever did.
Q. Okay.
A. But a good housewife and a mother, that's enough. That's a full operation.
MR. SCHWAM: I agree with it.
Q. (BY MR. ESSER) And that's -- you're owed for that?
A. Huh?
Q. You are owed for that?
A. I agree.
Q. Now, who owns the car that you drive? Do you own it or does the corporation own it?

A. I own my car, and McCann Ranch and Livestock owns the little car.
Q. Okay. If your account --
A. And I've always been given by my husband a car for my birthday, and I figure that red one is mine.
Q. Which one's the red one?
A. The Honda.
Q. Okay.
A. Because I -- I traded in the one I had got for my birthday for this one, so I figure that's mine.
Q. If your bank account ever runs low, do you ever, do you do anything about --
A. No. I take care of that.
Q. I mean, have you ever got to where you needed more money, and do you do anything about that? Do you go to Bill?
A. I told you I could use more money but I skimp.
Q. Has there ever been a time where you've gone to Bill or Mr. Meisner and said, hey, I need more money?
A. Yes. But so what?
Q. And what do they tell you?
A. It's all gone in lawsuits.
Q. Okay.
A. We don't even get anything at all for it because of the lawsuits. You've got to pay for those

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MINUTES OF THE SPECIAL MEETING OF THE
BOARD OF DIRECTORS OF
McCANN RANCH & LIVESTOCK, INC.
September 6, 2000

A Special Meeting of the Board of Directors of McCann Ranch & Livestock, Inc. was held pursuant to Notice on September 6, 2000, copy of which Notice is attached hereto and included herein as Exhibit "A", at the offices of the Corporation located at 1027 Bryden Avenue, Lewiston, Idaho.

Present at the meeting were Directors William V. McCann, Jr., Larry J. Durkin and Gary E. Meisner. Also present were Michael E. McNichols, attorney for Gary E. Meisner, corporate counsel Cumer L. Green, Merlyn W. Clark, attorney for William V. McCann, Jr. and Chantell Hoisington, Corporate Secretary.

President McCann called the meeting to order at 11:25 a.m.

Minutes

President McCann said that the first order of business would be approval of the Minutes of the Board of Directors Meeting held on August 9, 2000.

A discussion then ensued concerning the draft of the Minutes which had been distributed by fax on the afternoon of September 5, 2000 to the Directors. As a result of the discussion, it was determined that certain changes needed to be made to the Minutes, to-wit:

Corrections to

August 9, 2000 Meeting Minutes

1. On Page 1, insert a new paragraph immediately after the first paragraph of the section entitled "Allegations" as follows:

> President McCann then delivered to Mr. Baltins, counsel for Ronald R. McCann, a copy of the August 9, 2000 letter to Mr. Green requesting further information to explain certain specific allegations contained in Mr. Baltins' letter of June 9, 2000 (a copy of which is attached hereto as Exhibit B and included herein as if set forth in full).

1. On Page 2, insert a new paragraph immediately after the third paragraph of the section entitled "Allegations" as follows:

> Mr. Baltins informed the Directors that Ronald R. McCann desired to be appointed as a member of the Gertrude McCann Compensation Committee. The President deferred the request.

2. On Page 2, paragraph 3, line 4, insert after the words "excepting those items" the words "See Items No. 5c, 6b and 6c of Exhibit A".

3. On Page 4, first sentence of first full paragraph, delete the words "Mr. Baltins" and insert the words "Mr. Durkin".

4. On Page 4, second line of first full paragraph, delete the words "and felt he" and insert the words "and inquired as to whether or not he".

5. In the last sentence at the bottom of Page 4, delete the words "and that fees and costs to date were approximately $3,000 to $5,000".

After full and complete discussion and upon motion duly made by Larry J. Durkin and seconded by Gary E. Meisner, the following Resolution was presented:

> That the Minutes of the Meeting of the Board of Directors held on August 9, 2000, including the corrections (set forth above) be hereby approved.

Vote being had on the above and foregoing Resolution and the same having been counted and found to be unanimously in favor thereof, President McCann declared said Resolution adopted.

A. Gertrude McCann Compensation Committee

President McCann then noted that during the Director's Meeting on August 9, 2000 that he had deferred a decision on Ronald R. McCann's request to become a member of the A. Gertrude McCann Compensation Committee. President McCann stated that he had considered the matter and based on his consideration and evaluation of the request, has decided to and hereby does deny the same.

A. Gertrude McCann Compensation

The President then announced that the Board would consider the matter of A. Gertrude McCann's compensation noting that she had been employed by the Corporation as a consultant

since the death of her husband, the founder of the Corporation, on October 27, 1997.

President McCann then advised the Board that the Shareholders, in a meeting earlier on the same date, had passed by a 2-1 vote a Resolution recommending the Board of Trustees pay a lifetime annuity to A. Gertrude McCann and as deferred compensation for the services that she and William V. McCann, Sr. had provided to the Corporation for minimal consideration since the Corporation's inception on July 2, 1974.

After full and complete discussion and upon motion duly made by Gary E. Meisner and seconded by Larry J. Durkin, the following Resolution was presented:

> WHEREAS, the Shareholders of the Corporation have by a 2-1 vote recommended that the Board of Directors provide a lifetime annuity to A. Gertrude McCann for services rendered by both she and her husband to the Corporation for minimal compensation since formation of the Corporation on July 2, 1974. (See Minutes of the Shareholder's Meeting held on September 6, 2000); and
>
> WHEREAS, Corporate Counsel, Cumer L. Green, has advised the Board that inasmuch as one Shareholder voted against that Resolution, to-wit Ronald R. McCann, that there might be certain exposure to the Directors should such compensation program be instituted; and
>
> WHEREAS, the Directors are not willing to accept such potential liability, particularly in light of the lawsuit that has been filed by Ronald R. McCann against the Corporation and certain of its Directors.
>
> NOW THEREFORE, BE IT RESOLVED that the Board of Directors of McCann Ranch and Livestock, Inc. decline to approve the recommendation of the Shareholders or to authorize payment of a deferred compensation annuity to A. Gertrude McCann.

Vote being had on the above and foregoing Resolution and the same having been counted and found to be unanimously in favor thereof, President McCann declared said Resolution adopted.

Current Consulting Contract With A. Gertrude McCann

President McCann then announced the Board would consider the current contract with A. Gertrude McCann for consulting services.

After a full and complete discussion, upon motion duly made by Larry J. Durkin and seconded by Gary E. Meisner, the following Resolution was presented.

BE IT RESOLVED that the Corporation shall terminate the current consulting arrangement with and discontinue making compensation payments to A. Gertrude McCann and to initiate such reasonable action as shall be necessary to determine if any ultra vires compensation has been paid to A. Gertrude McCann and if so, to secure or recover for the Corporation such payments, if any there be, from A. Gertrude McCann, who is now 84 years of age.

Vote being had on the above and foregoing Resolution and the same having been counted and found to be unanimously in favor thereof, President McCann declared said Resolution adopted.

Past Due Rental of Shop and Storage Facilities to A. Gertrude McCann

President McCann then announced that the Board would consider the matter of payment of past due rent to A. Gertrude McCann.

After a full and complete discussion, upon motion duly made by Larry J. Durkin and seconded by Gary E. Meisner, the following Resolution was presented.

WHEREAS, the Corporation on March 1, 1988 caused to be constructed upon the property owned by A. Gertrude McCann (jointly with William V. McCann, Sr. prior to his death) certain shop and storage facilities including a steel building; and

WHEREAS, the Corporation constructed such facilities on March 1, 1988 and have utilized that building, the surrounding grounds and parking areas and the means of ingress and egress continuously since said death of William V. McCann, Sr. without payment of rental compensation to the property owners; and

WHEREAS, during said period of time, without compensation from the Corporation, in addition to allowing use of said property, A. Gertrude McCann and her deceased spouse paid ad valorem taxes, insurance costs and maintenance costs with respect to said property; and

WHEREAS, the Board of Directors have reviewed and analyzed the value of such usage and have determined that a fair market rent commencing on March 1, 1988 through present date would be the sum of $5,500 per year and that such unpaid past due amounts should reasonably carry interest at the rate of 8% per annum, compounded monthly; and

WHEREAS, said amounts through August 1, 2000, (12-1/2 years total in excess of $106,000), which the Directors believe is fair and adequate consideration for the use of said property and the benefits the the Corporation has derived therefrom; and

WHEREAS, the Corporation is desirous of utilizing the payment of such proceeds to A. Gertrude McCann and her deceased husband (which also have been interest bearing), to offset against ultra vires payments made to A. Gertrude McCann, if any there be, to pay off debt owed to the Corporation arising from advances to William V. McCann, Jr. and A. Gertrude McCann and to pay the residual, if any, in cash to A. Gertrude McCann; and

WHEREAS, such benefits should be paid to A. Gertrude McCann only with her consent in a manner agreeable to both A. Gertrude McCann and the Corporation.

NOW, THEREFORE BE IT RESOLVED, that the Board of Directors of McCann Ranch and Livestock, Inc. hereby authorize and direct the Officers of the Corporation to pay by way of credit or otherwise to A. Gertrude McCann fair and reasonable compensation for the use of the property of A. Gertrude McCann the amount of at least $106,000, as described above.

BE IF FURTHER RESOLVED that Director Gary E. Meisner is hereby authorized and directed to confer with A. Gertrude McCann and to secure her approval and authorization for a mode and manner of offset and/or payment consistent with the above Recitals and to report to the Corporation President the results of such negotiation.

BE IT FURTHER RESOLVED that if such negotiations can result in agreement consistent with the above parameters, that Gary E. Meisner, after receiving approval from President William V. McCann, Jr. document, execute and enter into the necessary agreements with A. Gertrude McCann to effectuate the intent of this Resolution and directive.

Vote being had on the above and foregoing Resolution and the same having been counted and found to be unanimously in favor thereof, President McCann declared said Resolution adopted.

Rental of Shop and Storage Facilities

The President then announced that the last order of business would be consideration of an ongoing rental amount for current rent for the Corporate shop and storage facilities located on the property of A. Gertrude McCann.

After full and complete discussion and upon motion duly made by Larry J. Durkin and seconded by Gary E. Meisner, the following Resolution was presented:

> BE IT RESOLVED that the Board of Directors of McCann Ranch and Livestock, Inc. hereby authorize and direct Gary E. Meisner to negotiate and enter into a Lease Agreement with A. Gertrude McCann for use of that property upon which the Corporate shop and storage facilities are located, together with the rights of ingress, egress, parking, etc. and to cause the same to be formalized into a Lease Agreement approved by Corporate Counsel, the use of said facilities, obtaining normal and acceptable protections for the Corporation, for an amount of $500 per month, Landlord to pay taxes, insurance and maintenance for a term of one (1) year with five (5) automatic one (1) year extensions if notice not given to terminate.
>
> BE IT FURTHER RESOLVED that upon completion of negotiations within these parameters and presentation to and approval of the Lease by President William V. McCann, Jr., Director Gary E. Meisner is authorized to execute and enter into said Lease Agreement on behalf of this Corporation.

Vote being had on the above and foregoing Resolution and the same having been counted and found to be unanimously in favor thereof, President McCann declared said Resolution adopted.

Corporate Action/Allegations

The President then announced that the next order of business concerned the June 9, 2000 letter of Maris Baltins, sent on behalf of Ronald R. McCann, making demand upon the Corporation to take certain actions, a copy of which is attached hereto as Exhibit "B".

The discussion ensued whereby it was noted that President McCann had made a written response to the Board, a copy of which is attached hereto as Exhibit "C", which had been conveyed to Mr. Baltins on which the Board, after due consideration, took action to accept President McCann's report and take no Corporate action on the items reported on therein, except for four specific items upon which the Corporation directly and through Cumer L. Green, requested additional information from Ronald R. McCann and his counsel, Maris Baltins. (See Minutes of August 9, 2000 Meeting and letter of William V. McCann, Jr. attached hereto as Exhibit "D").

Mr. Green noted that no further information had been received from Mr. Baltins in those regards.

It was also noted that last evening Mr. Baltins at 5:10 p.m. M.D.T. on September 5, 2000 had submitted a letter to Cumer L. Green, Corporate Counsel, requesting certain additional

information and reraising allegations and making new allegations.

The Board expressed its desire to respond fully to Mr. Baltins and Shareholder Ronald R. McCann with respect to the action it had taken regarding the allegations contained in Mr. Baltins' June 9, 2000 letter, including those actions taking place during this meeting, to have such responses prepared by Corporate Counsel, Cumer L. Green, and sent to Mr. Baltins before week end.

After full and complete discussion and upon motion duly made by Gary E. Meisner and seconded by Larry J. Durkin, the following Resolution was presented:

WHEREAS, on August 9, 2000 the Board of Directors with respect to the allegations raised in Mr. Baltins' June 9, 2000 letter resolved as follows:

> "After a full and complete discussion, a motion was made by Gary E. Meisner and seconded by Larry J. Durkin to accept President McCann's responses as set forth on Exhibit "A", to note the corrective actions that had been taken and to take no further action on the same, excepting those items (See Items No. 5e, 6b and 6e of Exhibit "A") that needed further clarification and explanation from Ronald McCann and Mr. Baltins before they could be fully answered and then only subsequent to the receipt of such information. Gary E. Meisner, Larry J. Durkin and William Vern McCann, Jr. voted "aye" and Ronald R. McCann abstained from voting. The Chairman then declared the Resolution adopted."

; and

WHEREAS, since that time no additional information has been received with respect to the four excepted items set forth in the above paragraph; and

WHEREAS, the Board has reviewed Mr. Baltin's September 5, 2000 letter (a copy of which is attached hereto as Exhibit "E") and has determined that certain numbered items (3, 4, 5a, 5f, 5g, 6d, 7a-7d, 7e, 7f, 8a, 8b, 9, 10, 11, 12, 13), contained therein have already been considered by the Board and pursuit of the same by way of any form of action on behalf of the Corporation would not be in the best interests of the Corporation; and

WHEREAS, at least one other item set forth in Mr. Baltin's letter appears to be a new item which, even though proper demand has not been made on the Corporation, a determination will be made after investigation as to whether any further action is needed.

NOW, THEREFORE, BE IT RESOLVED that no further information having been received from Mr. Baltins with regard to the four items identified in the above Recitals and on Exhibit "D" and the same being de minimis on their face, it is the decision of this Board of Directors, after due consideration, that it is not in the best interests of the Corporation to pursue any claim with regard to those four (4) items; and

BE IT FURTHER RESOLVED, that with regard to Mr. Baltin's letter of September 5, 2000, the allegations or requests contained in numbered items (identified in the above Recitals) have been previously investigated and considered and acted upon by the Directors and no further action will be taken with regard to the same, it being determined that there is no cause of action or that any error has been corrected.

BE IT FURTHER RESOLVED, that with respect to the remaining allegations and requests, there are determined to be new requests by the Board of Directors and the President of the Corporation is directed to investigate the same and report to the Board within a reasonable time.

BE IT FURTHER RESOLVED, that Corporate Counsel, Cumer L. Green, is hereby directed to prepare a report for issuance to Maris Baltins as the representative of Ronald R. McCann, and to the Directors of the Corporation, reporting on the Corporate action that have been taken with regard to the allegations raised by Mr. Baltins on behalf of Ronald R. McCann in his June 9, 2000 letter and otherwise as determined by Mr. Green and to issue such report by week end.

Vote being had on the above and foregoing Resolution and the same having been counted and found to be unanimously in favor thereof, President McCann declared said Resolution adopted.

Executive Compensation

The President then announced the last item to be the report of the Compensation Committee with regard to the salary of President William V. McCann, Jr.

After full and complete discussion and upon motion duly made by Larry J. Durkin and seconded by Gary E. Meisner, the following Resolution was presented:

WHEREAS, at the August 9, 2000 Board Meeting the Compensation Committee was directed to review the adequacy of the compensation of the President of the Corporation, William V. McCann, Jr.; and

WHEREAS, the members of that Committee, to-wit: Gary E. Meisner

and Larry J. Durkin, have reviewed the same and have determined, based upon facts known to them and their extensive experience in the areas of operations conducted by the Corporation of which William V. McCann, Jr. has responsibility, that the existing compensation level of President William V. McCann, Jr. is satisfactory.

NOW, THEREFORE BE IT RESOLVED that the Board of Directors of McCann Ranch and Livestock, Inc. hereby confirm that the present compensation program for President William V. McCann, Jr. and direct that such program continue.

Vote being had on the above and foregoing Resolution and the same having been counted and found to be unanimously in favor thereof, President McCann declared said Resolution adopted.

Dividends

The President then announced the next order of business would concern hearing the report of the Dividend Committee.

On behalf of the Committee, whose members are Larry J. Durkin and Gary E. Meisner, Mr. Durkin presented the report of the Committee and reported that inasmuch as the Corporation was presently a Defendant in a premature lawsuit filed by Shareholder Ronald R. McCann and incurring legal fees in defense of that action and because that action filed by Ronald R. McCann caused the Board of Directors, after due consideration, to agree to indemnify Directors Gary E. Meisner and William V. McCann, Jr., who had bee named as Defendants in said suit and as a result of such indemnification to pay the legal fees and costs incurred by said Directors, all of which fees, costs and expenses are ongoing, that dividends should not be declared or paid by the Corporation at this time.

After full and complete discussion and upon motion duly made by Larry J. Durkin and seconded by Gary E. Meisner, the following Resolution was presented:

BE IT RESOLVED that the Board of Directors for the reasons stated in the report of the Dividend Committee, hereby declines to declare or pay a dividend.

Vote being had on the above and foregoing Resolution and the same having been counted and found to be unanimously in favor thereof, President McCann declared said Resolution adopted.

There being no further business to come before the Board, the President declared the meeting adjourned.

Chantell Hoisington
Corporate Secretary

Chas. F. McDevitt (ISB No. 835)
Dean J. Miller (ISB No. 1968)
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Attorneys for Nominal Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN, Plaintiff, vs. WILLIAM V. McCANN, JR., and GARY E. MEISNER, Defendants. McCANN RANCH & LIVESTOCK COMPANY, INC., Nominal Defendant.	Case No. CV 08-01226 MCCANN RANCH & LIVESTOCK COMPANY, INC.'S MOTION TO STRIKE AND DISREGARD TESTIMONY FROM THE AFFIDAVITS OF KAREN A. GINNETT, CPA, CFE, MST, AND FROM THE AFFIDAVIT OF DENNIS R. REINSTEIN, CPA/ABV, ASA, CVA, AND THE RELATED ARGUMENT CONTAINED IN PLAINTIFF'S RESPONSIVE SUMMARY JUDGMENT MEMORANDUM ORAL ARGUMENT REQUESTED

COMES NOW McCann Ranch & Livestock Company, Inc. (the "Corporation"), by and through its undersigned counsel of record, McDevitt & Miller LLP, and moves the Court for an order to strike and disregard certain testimony presented in the affidavits of Karen A. Ginnett, CPA, CFE, MST, and Dennis R. Reinstein, CPA/ABV, ASA, CVA, and all related argument provided in Plaintiff's Responsive Summary Judgment Memorandum.

This motion is supported by the accompanying Memorandum of Points and Authorities.

ORAL ARGUMENT REQUESTED.

DATED THIS 17th day of February, 2010.

MCDEVITT & MILLER LLP

By _____
Charles F. McDevitt, ISB No. 835
Attorneys for Nominal Defendant McCann Ranch & Livestock Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of February, 2010, I caused to be served a true copy of the foregoing McCann Ranch & Livestock Company, Inc.'s Motion to Strike and Disregard Testimony by the method indicated below, and addressed to each of the following: addressed to each of the following:

Timothy Esser ESSER & SANDBERG, PLLC 520 East Main Street Pullman, WA 99163 [Attorneys for Plaintiff]	X U.S. Mail, Postage Prepaid ____ Hand Delivered ____ Overnight Mail X E-mail ____ Telecopy: 509.334.2205
Andrew Schwam SCHWAM LAW FIRM 514 South Polk, #6 Moscow, ID 83843 [Attorneys for Plaintiff]	X U.S. Mail, Postage Prepaid ____ Hand Delivered ____ Overnight Mail X E-mail ____ Telecopy
Michael E. McNichols CLEMENTS BROWN 321 13th Street P.O. Box 1510 Lewiston, ID 83501-1510 [Attorneys for Defendant Gary Meisner]	____ U.S. Mail, Postage Prepaid ____ Hand Delivered ____ Overnight Mail X E-mail ____ Telecopy: 208.746.0753
Merlyn W. Clark, ISB No. 1026 Hawley Troxell Ennis & Hawley LLP 877 Main Street, Suite 1000 P.O. Box 1617 Boise, ID 83701-1617 [Attorneys for Defendant William V. McCann, Jr.]	____ U.S. Mail, Postage Prepaid ____ Hand Delivered ____ Overnight Mail X E-mail ____ Telecopy: 208.336.6912

Chas. F. McDevitt

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN, Plaintiff, vs. WILLIAM V. McCANN, JR., and GARY E. MEISNER, Defendants. McCANN RANCH & LIVESTOCK COMPANY, INC., Nominal Defendant.	Case No. CV 08-01226 MEMORANDUM IN SUPPORT OF MCCANN RANCH & LIVESTOCK COMPANY, INC.'S MOTION TO STRIKE AND DISREGARD TESTIMONY FROM THE AFFIDAVITS OF KAREN A. GINNETT, CPA, CFE, MST, AND THE AFFIDAVIT OF DENNIS R. REINSTEIN, CPA/ABV, ASA, CVA, AND THE RELATED ARGUMENT CONTAINED IN PLAINTIFF'S RESPONSIVE SUMMARY JUDGMENT MEMORANDUM

COMES NOW McCann Ranch & Livestock Company, Inc. (the "Corporation"), by and through its undersigned counsel of record, and respectfully submits the following Memorandum in support of its Motion to Strike and Disregard Testimony From the Affidavits of Karen A.

Ginnett, CPA, CFE, MST, and Dennis R. Reinstein, CPA/ABV, ASA, CVA, and the Related Argument Contained in Plaintiff's Responsive Summary Judgment Memorandum.

I.

INTRODUCTION

The Corporation's Motion to Strike and Disregard certain objectionable affidavit testimony presented by Karen Ginnett and Dennis Reinstein should be granted because these affidavits filed in support of Plaintiff's Motion for Summary Judgment fail to meet the requirements of admissibility under Idaho Rule of Civil Procedure 56(e), and under Idaho Rules of Evidence 402, 403, 602, 702 and 802. Accordingly, prior to considering the argument and evidence pursuant to Idaho Rule of Civil Procedure 56(c), the Court must determine the admissibility of evidence submitted by Plaintiff. *See Montgomery v. Montgomery*, 147 Idaho 1, 205 P.3d 650 (2009) (judge abused discretion when he failed to determine the admissibility of evidence prior to ruling on summary judgment motions).

II.

ARGUMENT

A. Legal Standard Of Admissibility.

The standard of admissibility in a summary judgment proceeding is governed by Idaho Rule of Civil Procedure 56(e), which provides that:

> Supporting or opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . .

I.R.C.P. 56(e).

Rule 56(e) is clear that affidavits must contain admissible evidence. *See Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 782, 839 P.2d 1192 (1992). In *Hecla Mining*, the Idaho Supreme Court held that affidavits which consist only of conjecture, conclusory allegations as to ultimate facts, or conclusions of law are to be disregarded. *Id.* Furthermore, conclusory statements, statements based on hearsay, statements that lack adequate foundation, and statements not made on personal knowledge are insufficient. *See State v. Shama Resources Ltd. Partners*, 127 Idaho 267, 271, 899 P.2d 977 (1995). In *Shama Resources*, the Idaho Supreme Court affirmed the trial court's rejection of statements made by an affiant regarding the knowledge or beliefs of persons other than the affiant. 127 Idaho at 271.

Further, in *Sprinkler Irrig. Co., Inc. v. John Deere Ins. Co.*, 139 Idaho 691, 85 P.3d 667 (2004), the Idaho Supreme Court affirmed the district court's action striking plaintiff's expert's affidavit wherein the affidavit was filled with rambling, nonspecific, inaccurate and unsupported statements, numerous counts of speculation, unfounded facts and hearsay statements. *Id.* at 697. The Idaho Supreme Court stated that the district court properly concluded that the expert's affidavit degenerated into an argumentative diatribe against the defendant and often lacked the specificity required by Rule 56(e). Specifically, the court stated, "It is intermittently generalized, conclusory, speculative and argumentative. The affidavit includes a significant number of factual assertions that would not be admissible in evidence, often lacking foundation by failing to show affirmatively that the affiant is competent to testify regarding the factual allegations." *Id.*

Expert opinion evidence is governed by Idaho Rule of Evidence 702, which provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

See Swallow v. Emergency Medicine of Idaho, PA, 138 Idaho 589, 592, 67 P.3d 68, 71 (2003). This Rule provides the appropriate test for measuring the reliability of evidence. *Id.*; *see Weeks v. Eastern Idaho Health* Services, 143 Idaho 834, 153 P.3d 1180 (2007); State *v. Merwin*, 131 Idaho 642, 962 P.2d 1026 (1998).

To be admissible, the expert's testimony must assist the trier of fact to understand the evidence or to determine a fact in issue. An expert opinion that is speculative or unsubstantiated by facts in the record is inadmissible because it would not assist the trier of fact to understand the evidence or determine a fact that is at issue. *Swallow*, 138 Idaho at 592; *see Bromley v. Garey*, 132 Idaho 807, 979 P.2d 1165 (1999).

Additionally, expert opinion that merely suggests possibilities would only invite conjecture and may be properly excluded. *Bromeley v. Gary*, 132 Idaho 807, 979 P.2d 1165 (1999) (excluding testimony of shotgun repair expert concerning possible causes of misfiring where expert never performed an internal examination of the weapon and only speculated about possible causes was not error).

Furthermore, Federal courts have consistently held that testimony consisting of legal conclusions offered to assist the trier of fact in determining questions of law is inadmissible under Federal Rule 702. For example, in *Adalman v. Baker, Watts & Co.*, 807 F.2d 360 (4th Cir. 1986), the court upheld the trial court's decision to preclude an attorney from testifying as an

expert witness concerning the applicability and meaning of securities laws. Similarly, in *Marx & Co. v. Diners Club, Inc.*, 550 F.2d 505 (2d Cir.), *cert. denied,* 434 U.S. 861 (1977), the court held it was error for the trial court to have admitted the opinion of an expert qualified in securities regulation as to the legal obligations of parties pursuant to the contract in issue. The court stated: "It is not for the witnesses to instruct the jury as to applicable principles of law, but the judge. As Professor Wigmore has observed, expert testimony on law is excluded because 'the tribunal does not need the witness' judgment." *Id.* at 509-10.

The federal courts hold that a witness may not offer opinions about applicable law even if the witness has prior experience in interpreting and applying the law in question. For example, the Ninth Circuit Court of Appeals has observed that it "condemn[s] the practice of attempting to introduce law as evidence." *G. F. Co. v. Pan Ocean Shipping,* 23 F.3d 1498, 1507 (9th Cir. 1994); *United States v. Unruh,* 855 F.2d 1363, 1376 (9th Cir. 1987), *cert denied,* 488 U.S. 974 (1988); *see also United States v. Scholl,* 166 F.3d 964 (9th Cir. 1999). Other circuit courts have also condemned that practice. *Specht v. Jensen,* 853 F.2d 805 (10th Cir. 1988), *cert. denied,* 513 U.S. 947; *United States v. Curtis,* 782 F.2d 593 (6th Cir. 1986); *United States v. Zipkin,* 729 F.2d 384 (6th Cir. 1984); *Paner v. Marshall Field & Co.,* 646 F.2d 271 (7th Cir. 1981); *Hogan v. AT&T,* 812 F.2d 409 (8th Cir. 1987); *Owen v. Kerr-McGee Corp.,* 689 F.2d 236 (5th Cir. 1983).

Idaho law is in accord. An opinion of an expert that calls for a legal conclusion is not admissible in the courts of Idaho. *Martin v. Hackworth,* 127 Idaho 68, 896 P.2d 976 (1995); *Hawkins v. Chandler,* 88 Idaho 20, 396 P.2d 123 (1964).

III.

LEGAL OBJECTIONS

A. The affidavit testimony of Karen Ginnett should be stricken.

¶ NO.	STATEMENT	OBJECTION
2	I have assisted Dennis Reinstein in this matter and have reviewed all the material mentioned in his affidavit. I share his opinions.	The statements lack the necessary foundation for admissibility in that they do not set forth any specific facts of who, what, where, when and how; the statements are generalized, conclusory and irrelevant. I.R.E. 402.
3	The term "fraud" as used in the tax law, means an actual and deliberate, or willful wrongdoing with the specific intent to evade tax believed to be owed. The existence of fraud is a question of fact to be determined on a case by case basis considering the entire record of transactions. Fraudulent intent can seldom be established by a single act. The Tax Court in *Schmitz, John Noehl* (1983) TC Memo 1983-482, set out three elements of fraud: (1) a knowing falsehood; (2) an underpayment of tax; and (3) an intent to evade tax. It is important to understand that the tax evasion motive need not be the only motive or even the principal motive for the transaction(s) as long as it is a motive. The deductions claimed on the Corporation's tax returns for questionable payments to Gertrude McCann and a portion of her personal expenses may be viewed as a way to	These statements constitute improper legal argument and improper assertions of legal conclusions, speculation, and irrelevant. I.R.E. 402, 602.

¶ NO.	STATEMENT	OBJECTION
	avoid paying tax and therefore tax evasion. The assessment of the civil fraud penalty would be available to the auditor.	
4	It appears that during the 1986/1987 audit, the taxing authorities did review the transactions between the Corporation and one of its principals, specifically William McCann, Sr., and found that the Corporation was improperly deducting as business expenses the personal expenses of Mr. McCann, Sr.	The statements lack the necessary foundation for admissibility in that they do not set forth any specific facts of who, what, where, when and how; the statements are generalized, conclusory and irrelevant, and inadmissible hearsay. I.R.E. 402, 802.
5	The fact that Gertrude McCann reports some income on her tax return does not change the question as to the legitimacy of deducting these payments as business expenses of the Corporation. If an expense is not deemed to be ordinary and necessary under Section 162 of the Internal Revenue Code, the fact that Gertrude McCann has reported some of the payments as income will not affect the denial of the deduction on the corporate return.	These statements constitute improper legal argument and improper assertions of legal conclusions, speculation, and irrelevant. I.R.E. 402, 602.
6	It is my opinion, and for the reasons set forth in detail in Dennis Reinstein's affidavit, the financial transactions that the Corporation has engaged in since January 5, 2001 with Gertrude McCann do expose the Corporation to substantial liabilities in the event of an audit. Simply put, the Corporation is lucky that it has not been audited and had these questionable transactions reviewed. These transactions create a threat of additional taxes and	The statements lack the necessary foundation for admissibility in that they do not set forth any specific facts of who, what, where, when and how; the statements are generalized, conclusory and irrelevant. I.R.E. 402; these statements constitute improper legal argument and improper assertions of legal conclusions, speculation, and irrelevant. I.R.E. 402, 602.

¶ NO.	STATEMENT	OBJECTION
	assessment of interest and penalties which threaten harm to the Corporation.	

B. The affidavit testimony of Dennis R. Reinstein should be stricken.

¶ NO.	STATEMENT	OBJECTION
4.1	Gertrude McCann Compensation. The minutes of the September 6, 2000, board of directors meeting state:	This Court has indicated that it will only consider facts subsequent to January 5, 2001, the date on which the district court dismissed McCann I. *See* March 4, 2009 Order at 7 ("In addressing the new claims on the merits, the Court anticipates that it will be considering events that took place after January 5, 2001"). In the Court's August 31, 2009 Order addressing discovery disputes, this Court referenced the statement by the Idaho Supreme Court in McCann I that the Plaintiff could subsequently assert "new" claims "that may arise following the order of dismissal." *See* August 31, 2009 Order at 2 (citing McCann I, 138 Idaho 228, 332, fn.2). This exclusion of facts pre-1/5/2001 does not apply to the history of the promissory notes.
4.2	Advances for Expenses. Beginning before 2001 and continuing since, the Corporation has routinely paid personal expenses for Gertrude McCann, including, but not limited to, utilities, insurance and automobile expenses. At the end of each year, the	The time period before 2001 is irrelevant in this action. The statements lack the necessary foundation for admissibility, generalized and conclusory summation of actions taken by the Corporation's accountant, Dorothy

¶ NO.	STATEMENT	OBJECTION
	Corporation's accountant, Dorothy Snowball, increases the account receivable due from Gertrude McCann for an estimated amount for some of these expenses and calculates interest on the balance of the receivable at year end. The Corporation deducts the balance of the expenses on its tax returns.	Snowball, lacks personal knowledge, and is irrelevant. I.R.E. 402, 403, and 602.
4.6	I have asked Plaintiff's attorneys to ascertain what amount William McCann, Jr. and/or his wife, Lori, assert is owed to them by Gertrude McCann and/or the trust for which she is the beneficiary. I am informed that they have refused to provide that discovery. I expect that the amount claimed owing to William McCann, Jr. and Lori McCann will compete with the amount reportedly owed by Gertrude McCann to the Corporation.	The statements lack the necessary foundation for admissibility, lack personal knowledge, inadmissible hearsay, speculation, inadmissible argument, and is irrelevant. I.R.E. 402, 403, 602, and 802.
4.7	Gertrude McCann testified that she does not owe the Corporation any money, nor did she even acknowledge the existence, let alone validity, of the promissory note she purportedly owes.	Inadmissible hearsay and improper attempt to present hearsay testimony by an expert. I.R.E. 802 and 703.
4.7	I have been provided no documentation or deposition testimony that would suggest that Gertrude McCann claimed to be owed anything for this alleged past due rental. I have been provided no evidence of a writing (other than the corporate resolution) that would support this liability that purportedly extends for some 12 years previous to the year 2000 Decision. . . . The promissory note from the Corporation to Gertrude McCann has	The statements lack the necessary foundation for admissibility, speculation, conclusory and irrelevant. I.R.E. 402, 403 and 602.

¶ NO.	STATEMENT	OBJECTION
	never been reported as a liability of the Corporation in its books and records or on its financial statements.	
5.1	In my opinion, the financial transactions a corporation has engaged in with Gertrude McCann, were not in furtherance of the ordinary and necessary business purposes of the corporation, but were designed as a means to support her lifestyle as an alternative to declaring dividends and/or redeeming corporate stock from the trust to which she is a beneficiary.	The statements lack the necessary foundation for admissibility, speculation, conclusory and irrelevant. I.R.E. 402, 403 and 602.
5.2	Plaintiff's counsel has asked me to assume that an appropriate definition of "threat of irreparable harm" is two-fold: (1) harm that cannot be repaired, e.g., a loss of money that cannot be recouped; and (2) that the harm is of a significant amount. Utilizing this definition, in my opinion, the transactions between the corporation and Gertrude McCann threatened the corporation with irreparable harm in at least two ways: first, they create the potential for the taxing authorities to reclassify these transactions as disguised dividends. This could result in substantial taxes, interest and penalties being assessed against the corporation, and possibly the William V. McCann, Sr. Stock Trust and/or Gertrude McCann. Second, there is a receivable from Gertrude McCann owing to the corporation increasing in both principle and accruing interest, from which amounts due to the corporation may never be collected.	The statements lack the necessary foundation for admissibility, speculation, conclusory and irrelevant. I.R.E. 402, 403 and 602; these statements constitute improper legal argument and improper assertions of legal conclusions, speculation, and irrelevant. I.R.E. 402, 602.

¶ NO.	STATEMENT	OBJECTION
6.1	If the business affairs of the corporation were selected for audit by either the Idaho State Tax Commission or the Internal Revenue Service, such audit would evaluate whether the transactions between the corporation and Gertrude McCann were ordinary and necessary business expenses. I believe that on a more likely than not basis, such an audit would find that these transactions were not for an ordinary and necessary business purposes and therefore would not be allowable deductions under the tax code.	The statements lack the necessary foundation for admissibility, speculation, conclusory and irrelevant. I.R.E. 402, 403 and 602; these statements constitute improper legal argument and improper assertions of legal conclusions, speculation, and irrelevant. I.R.E. 402, 602.
6.3	Further, as I understand a life estate, the life tenant retains rights and obligations related to the property until the grantee's rights terminate. The fact that the grantor corporation is paying expenses related to the property further magnifies their overpayment of value.	These statements constitute improper legal argument and improper assertions of legal conclusions, speculation, and irrelevant. I.R.E. 402, 602.
6.4	In response, I assert that the cash flow made available to Gertrude McCann could have been utilized for dividends.	The statement is conclusory; contains speculation; and is irrelevant. I.R.E. 402, 602.
6.4.1	While a portion of the net income was utilized to repay corporate debt, it is clear that had the transactions with Gertrude McCann not been engaged in, the corporation would have had funds available to pay dividends.	The statement is conclusory; contains speculation; and is irrelevant. I.R.E. 402, 602.
6.5.2	These alleged "potentially devastating" taxes could be avoided if a court ordered dissolution was accomplished by means of a tax free re-organization – a spin-off. Simply put, if whatever	The statement lacks a necessary foundation for admissibility; conclusory; contains speculation; improper assertion of legal conclusion, and is irrelevant. I.R.E.

¶ NO.	STATEMENT	OBJECTION
	share of the corporate assets that should be distributed to Ron McCann were distributed to a subsidiary corporation, then Ron McCann's stock in the current corporation were exchanged for the stock in this newly formed subsidiary corporation, he would then own (control) those assets. This would avoid "devastating tax consequences."	402, 403, and 602.

IV.

CONCLUSION

Based upon each of the foregoing objections to evidence, the above-identified affidavit testimony, and all related argument in Plaintiff's Response of Summary Judgment Memorandum, should be stricken and disregarded by the Court in deciding the Corporation's Motion for Summary Judgment.

RESPECTFULLY SUBMITTED THIS 17 day of February, 2010.

MCDEVITT & MILLER LLP

By _____
Charles F. McDevitt, ISB No. 835
Attorneys for Nominal Defendant McCann Ranch & Livestock Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of February, 2010, I caused to be served a true copy of the foregoing MEMORANDUM IN SUPPORT OF MCCANN RANCH & LIVESTOCK COMPANY, INC.'S MOTION TO STRIKE AND DISREGARD TESTIMONY FROM THE AFFIDAVITS OF KAREN A. GINNETT, CPA, CFE, MST, AND THE AFFIDAVIT OF DENNIS R. REINSTEIN, CPA/ABV, ASA, CVA, AND THE RELATED ARGUMENT CONTAINED IN PLAINTIFF'S RESPONSIVE SUMMARY JUDGMENT MEMORANDUM by the method indicated below, and addressed to each of the following: addressed to each of the following:

Timothy Esser ESSER & SANDBERG, PLLC 520 East Main Street Pullman, WA 99163 [Attorneys for Plaintiff]	X U.S. Mail, Postage Prepaid ____ Hand Delivered ____ Overnight Mail X E-mail ____ Telecopy: 509.334.2205
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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,

Plaintiff,

vs.

WILLIAM V. McCANN, JR., and GARY E. MEISNER,

Defendants.

McCANN RANCH & LIVESTOCK COMPANY, INC.,

Nominal Defendant.

Case No. CV 08-01226

REPLY MEMORANDUM IN SUPPORT OF MCCANN RANCH'S MOTION FOR SUMMARY JUDGMENT

The McCann Ranch & Livestock Company, Inc. (the "Corporation"), by and through its counsel of record, submits this reply memorandum in support of its motion for summary judgment.

I. INTRODUCTION

The Corporation's motion for summary judgment turns on one single issue – whether, under the undisputed facts and admissible evidence asserted by Plaintiff, there is a material issue of fact as to whether "irreparable injury to the corporation is threatened or being suffered."[1] *See* I.C. § 30-1-1430(2). Plaintiff has not, and cannot, raise any such issue of fact. Plaintiff has offered only a speculative assertion that certain transactions entered into between the Corporation and Gertrude McCann subject the Corporation to a risk of unspecified tax liability in the future in the event that the Corporation might someday be audited. This assertion is purely speculative and does not establish any threat to the Corporation of irreparable injury. Even if the Corporation were someday subjected to some tax liability to the IRS, such a monetary injury does not, as a matter of law, constitute irreparable injury to the Corporation. Plaintiff offers no evidence that the Corporation, which Plaintiff asserts is worth approximately $20 Million, could not easily pay any monetary penalty assessed by the IRS. Finally, the alleged injury asserted by Plaintiff is not an irreparable injury in that it could be compensated for through an action at law.

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1 The judicial dissolution statute sets forth two required elements: (1) that the directors have acted in a manner that is "illegal, oppressive or fraudulent," and (2) that "irreparable injury to the corporation is threatened or being suffered by reason thereof." I.C. § 30-1-1430. Defendants have focused this motion for summary judgment on the second element. Defendants do not concede that oppression has taken place, but Defendants do not challenge that element for purposes of this summary judgment motion.

II. SUMMARY OF UNDISPUTED FACTS AND EXPERT TESTIMONY

A. Pre-2001 Transactions

Much of Plaintiff's response to the Corporation's Motion for Summary Judgment is focused on events and transactions that occurred prior to 2001. For example, Plaintiff focuses on the fact that in "the late nineties," Gertrude McCann received "consulting fees" from the Corporation. These payments of consulting fees were a large focus of Plaintiff's claims in *McCann I* and were discussed by the *McCann I* trial court in its January 5, 2001 Order dismissing Plaintiff's complaint and denying Plaintiff's motion to amend his complaint. *See McCann I* Complaint (Exhibit 1 to Motion to Dismiss, filed July 15, 2008); *see also McCann I* January 5, 2001 Order (Exhibit 4 to Motion to Dismiss, filed July 15, 2008), p. 2, 4-5 (discussing the consulting fees paid to Gertrude McCann, and noting that those consultation fees stopped in September of 2000). Plaintiff also focuses on the fact that, in 2000, the Corporation agreed to pay Gertrude McCann $106,000 in back rent for the use of the Corporation's large shop building on Gertrude McCann's property. Again, this transaction was the subject of Plaintiff's motion to amend his complaint in *McCann I* and was discussed by the *McCann I* trial court in its January 5, 2001 Order dismissing Plaintiff's complaint and denying Plaintiff's motion to amend his complaint. *See McCann I* Supplemental Memorandum in Support of Plaintiff's Motion to Amend Complaint (Exhibit 3 to Motion to Dismiss, filed July 15, 2008), p. 5; *see also McCann I* January 5, 2001 Order (Exhibit 4 to Motion to Dismiss, filed July 15, 2008), p. 5 (explaining that "Plaintiff objects to paying Gertrude back rent for the shop for over twelve years."). Plaintiff

also focuses on the Corporation's purchase, in 2000, of Gertrude McCann's property, which consists of a home, barn, shop and several out buildings set on 25[2] acres.

These transactions pre-date the *McCann I* trial court's dismissal of *McCann I* on January 5, 2001 and are not a proper subject of this new lawsuit. In recognition that this is the second in a series of lawsuits containing virtually identical factual allegations, this Court has ordered that it will consider only facts subsequent to January 5, 2001, the date on which the District Court dismissed *McCann I* with prejudice. *See* March 4, 2009 Order, p. 7 ("In addressing the new claims on the merits, the court anticipates that it will be considering events that took place after January 5, 2001."). In a related March 5, 2009 Order addressing discovery disputes, this Court held that Defendants' responses to Plaintiff's discovery requests could be limited to events and transactions occurring after January 5, 2001. In an August 31, 2009 Order addressing related discovery disputes, this Court referenced the statement by the Idaho Supreme Court in *McCann I* that the Plaintiff could subsequently assert "new" claims "that may arise following the order of dismissal." *See* p. 2 (citing *McCann I*, 138 Idaho 228, 232, fn. 2).

Consistent with the statement by the Idaho Supreme Court, and as this Court has previously indicated, the Court should not consider any pre-2001 transactions in this case. It is true that the Corporation, in its Motion for Summary Judgment, made reference to the history of the promissory notes between Gertrude McCann and the Corporation and the purchase of the property from Gertrude McCann, which occurred prior to 2001. However, that discussion was in the context of explaining that the corporation has historically advanced payment for certain items

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2 In prior briefing, the Corporation had inadvertently described the property as consisting of 35 acres.

to Bill, Sr. and Gertrude McCann since the Corporation's inception and has carried those balances on an account receivable. That recitation of general background does not change the fact that Plaintiff's pre-2001 claims were litigated in *McCann I* and cannot be re-litigated here.

B. William V. McCann, Jr.'s Salary

Plaintiff had previously indicated that he would be challenging William V. McCann, Jr.'s salary as being excessive in support of his claim for dissolution of the Corporation. Plaintiff's Responsive Brief, however, makes no mention of the issue. Not surprisingly, Plaintiff's experts offer no opinion that the salary is excessive or threatens irreparable injury to the Corporation. By failing to address the issue of William V. McCann, Jr's salary, Plaintiff has waived that issue.

C. The Corporation's Purchase of Gertrude McCann's Property

As explained above, the Corporation's purchase of Gertrude McCann's property predates January 5, 2001, and therefore is not a proper subject of this litigation.[3] The Corporation agreed to purchase Gertrude McCann's property, which consists of a home, barn, shop and several out buildings set on 25 acres, for the sum of $310,000. Gertrude McCann, who was 84 years old at the time, retained a life estate in the property. The contract called for $40,000 to be paid at closing, the balance to be paid in monthly installments of $5,000, including interest at 7 ½ percent per annum.

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[3] The Corporation did not object to discovery related to the purchase of Gertrude McCann's property, even though it pre-dates January 5, 2001, because the pre-2001 purchase of the property has some relation to Plaintiff's post-2001 claims that the Corporation improperly provided Gertrude with payments for the maintenance of the property. The fact that discovery was allowed related to the pre-2001 purchase of the home does not mean that Plaintiff can now raise this pre-2001 claim.

Plaintiff now appears to be offering a half-hearted contention that the Corporation may have paid more than fair market value for the property. However, Plaintiff offers no evidence for this contention. Plaintiff's expert accountant, Dennis Reinstein, offers only the following:

> If the Corporation paid Gertrude McCann the fair market value for her home, it in fact received in return substantially less value than what it paid. At the date of the purchase Gertrude McCann was 84 years old and received a life estate. The value of the property subject to a life estate can be divided between the life estate and remainder interest utilizing IRS Table S. Application of this table provides that, at the date of the purchase of her home for $310,000, the value of the life estate Gertrude McCann received was $102,598 and the value of the remainder interest to the Corporation was $207,000.

See Reinstein, ¶ 6.3.

Mr. Reinstein's affidavit is more notable for what it does not say than for what it does say. Mr. Reinstein does not offer any opinion as to the fair market value of the property or that the Corporation paid more than that fair market value. Plaintiff has offered no appraisal or other evidence of the value of the property, nor is Mr. Reinstein qualified to opine as to its fair market value. Indeed, Mr. Reinstein appears to assume that the Corporation did pay the fair market value for the property. The only opinion given by Mr. Reinstein is that, "[i]f the Corporation paid Gertrude McCann the fair market value for her home," i.e., the fair market value to purchase a fee simple estate, then it overpaid because the Corporation received the property subject to Gertrude McCann's life estate. However, there is no evidence in the record that the Corporation paid anything other than the fair market value for what the Corporation received – the property,

subject to Gertrude McCann's life estate.[4] In fact, Plaintiff testified in his deposition that the purchase of the property "was a steal" because, in Plaintiff's opinion, the property was worth much more than the Corporation paid for it. *See* Affidavit of Chas. F. McDevitt, filed concurrently herewith, Exh. 1, p. 101.

D. Dennis Reinstein Affidavit

Plaintiff has offered the Affidavit of Dennis Reinstein in opposition to the Corporation's Motion for Summary Judgment. The opinions offered by that affidavit lack foundation, are speculative and are not relevant to the issue raised on summary judgment. Mr. Reinstein opines that "the financial transactions the Corporation has engaged in with Gertrude McCann, were not in furtherance of the ordinary and necessary business purposes of the Corporation, but were designed as a means to support her lifestyle as an alternative to declaring dividends and/or redeeming Corporate stock from the Trust to which she is a beneficiary." *Id.* at ¶ 5.1. Mr. Reinstein does not define or quantify the "financial transactions" to which he is referring, nor does he give any explanation as to the total monetary value he attaches to the allegedly wrongful "financial transactions."

Mr. Reinstein assumes the following definition of "threat of irreparable harm":

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4 Plaintiff selectively quotes from William V. McCann, Jr.'s testimony that Gertrude "needed money" in connection with his testimony about the Corporation purchase of the property from Gertrude McCann. Plaintiff ignores the testimony about the purchase furthering the interests of the corporation. For example, William V. McCann, Jr. testified that "I think [the Corporation is] getting benefit. I believe it's appreciating as real estate appreciates." *See Reinstein Aff.*, ¶ 4.3 (quoting William V. McCann, Jr.'s deposition testimony, p. 84). Plaintiff ignores the fact that the Corporation is in the real estate business and that this real estate acquisition merely added to the Corporation's other real estate holdings.

> (1) harm that cannot be repaired, e.g., a loss of money that cannot be recouped; and (2) that the harm is of a significant amount.

Id. at ¶ 5.2. Mr. Reinstein then goes on to opine that, under this definition, the transactions between the Corporation and Gertrude McCann threaten the Corporation with irreparable harm in two ways.

First, Mr. Reinstein opines that the transactions with Gertrude McCann "create the potential for the taxing authorities to reclassify these transactions as disguised dividends." *Id.* "This could result in substantial taxes, interest and penalties being assessed against the Corporation." *Id.* Notably, Mr. Reinstein does not state that an audit has been threatened by any taxing authority, nor does he offer any opinion as to the likelihood that anything on the Corporate tax returns would trigger an audit. Moreover, Mr. Reinstein offers no opinion as to the amount of any potential taxes, interest or penalties that might be assessed as a result of an audit. More importantly, Mr. Reinstein offers no opinion that the Corporation would not be able to easily pay whatever unspecified amount of taxes, interest or penalties might someday be owed by the Corporation.

Second, Mr. Reinstein opines that "there is a receivable from Gertrude McCann owing to the Corporation increasing in both principal and accruing interest, from which amounts due to the Corporation may never be collected." *Id.* (emphasis added). The receivable from Gertrude McCann is approximately $198,000 (much of which was incurred long before 2001). Moreover, the receivable is largely offset by the comparable amount owed to Gertrude McCann by the Corporation. *See* Dorothy Snowball Affidavit, ¶ 25 ($165,341 Promissory Note to the Corporation). Notably, Mr. Reinstein has no factual basis for his conclusory assertion that the amount receivable "may never be collected." His only support for this assertion is that "[t]he deposition testimony of Gary Meisner and William McCann, Jr. reveals that they are unaware of

what assets Gertrude McCann has and they are unable to identify assets from which she or her estate can repay the Corporation." *Id.* at ¶ 6.2. Notably, in offering this conclusory opinion, Mr. Reinstein does not state that he has reviewed Gertrude McCann's financial records or otherwise verified her financial status. Indeed, Mr. Reinstein reports in paragraph 2 of his affidavit the material he has reviewed, and that list does not include the deposition testimony of Plaintiff or Plaintiff's affidavit filed February 10, 2010. That very affidavit states that Gertrude McCann owns approximately 100 acres of land near Craigmont. Mr. Reinstein has no way of knowing Gertrude McCann's financial status or ability to pay the relatively small receivable to the Corporation. Thus, Mr. Reinstein's opinion that the "amounts due to the Corporation may never be collected" is purely speculative and is not factually supported.

E. Karen Ginnett Affidavit

Plaintiff has also offered the Affidavit of Karen Ginnett in opposition to the Corporation's Motion for Summary Judgment. Ms. Ginnett's affidavit sets forth the test for determining liability for tax fraud, a primary element of which is "an intent to evade tax." Without identifying any particular transactions, Ms. Ginnett offers the vague opinion that "[t]he deductions claimed on the Corporation's tax returns for questionable payments to Gertrude McCann and a portion of her personal expenses may be viewed as a way to avoid paying tax and therefore tax evasion." *Id.* at ¶ 3. Ms. Ginnett offers no explanation for this conclusory assertion, which is contrary to Mr. Reinstein's opinion in paragraph 5.1 of his Affidavit that the transactions with Gertrude McCann "were designed as a means to support her lifestyle as an alternative to declaring dividends and/or redeeming Corporate stock from the Trust to which she is a beneficiary."

Ms. Ginnett offers the conclusory assertion that "the financial transactions that the Corporation has engaged in since January 5, 2001 with Gertrude McCann do expose the Corporation to substantial liabilities in the event of an audit." *Id.* at ¶ 6. Again, just like Mr. Reinstein, Ms. Ginnett does not state that an audit has been threatened by any taxing authority, nor does she offer any opinion as to the likelihood that anything on the Corporate tax returns would trigger an audit. Ms. Ginnett offers no opinion as to the amount of interest or penalties that might result from an audit. Ms. Ginnett offers no opinion that the Corporation would not be able to pay any interest or penalties assessed. Indeed, Ms. Ginnett does not offer any opinion that the transactions threaten irreparable injury to the Corporation. Rather, Ms. Ginnett only opines that the transactions "threaten harm" to the Corporation, with no opinion as to whether that harm would be irreparable.

III. SUMMARY JUDGMENT STANDARD

Much of Plaintiff's opposition to the Corporation's motion for summary judgment is based on assertions that "material issues of fact" preclude entry of summary judgment. For example, Plaintiff asserts that "the Court will have to use its fact finding power to determine the probability of an audit and the amount of the harm which will result." In this case, however, there are no disputes as to the facts. For example, there are no disputes over what payments have been made to Gertrude McCann by the Corporation. There is only a legal dispute over whether the undisputed facts and evidence offered by Plaintiff satisfy the required element for dissolution of a corporation that "irreparable injury to the corporation is threatened or being suffered" by reason of oppression of a shareholder. The question of whether irreparable injury to the corporation is threatened or being suffered is a question of law that this Court can resolve on summary judgment based on the undisputed facts before the Court.

Notably, because the question of whether irreparable injury to the corporation is threatened or being suffered is a question of law, it is not the proper subject of expert testimony. *See* Memorandum in support of McCann Ranch & Livestock Company, Inc.'s Motion To Strike and Disregard Testimony, filed concurrently herewith. Thus, the fact that Plaintiff's experts offer conclusory legal opinions of a threat of irreparable injury does not create an issue of fact.

Moreover, Plaintiff erroneously asserts that the evidence, "including all reasonable inferences which can be drawn therefrom, creates a material issue of fact as to whether the oppression threatens the corporation with irreparable harm." *See* Responsive Brief, p. 2. Because plaintiff's complaint asserts only an equitable cause of action that would be tried to the Court without a jury, "the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences." *Intermountain Forest Management, Inc. v. Louisiana Pacific Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001).

Finally, the Idaho Supreme Court has explained that summary judgment is appropriate where "the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial." *Thomas v. Medical Center Physicians, P.A.*, 138 Idaho 200, 205, 61 P.3d 557, 562 (2002) (citing *Celotex v. Catrett*, 477 U.S. 317 (1986)). Here, Plaintiff has the burden of proof of establishing that "irreparable injury to the corporation is threatened or being suffered." Given that plaintiff cannot establish that required element, summary judgment is appropriate.

IV. ARGUMENT

A. Summary Judgment Is Appropriate Because Plaintiff Cannot Establish A Material Issue Of Fact As To The Required Element That "Irreparable Injury To The Corporation Is Threatened Or Being Suffered"

This motion for summary judgment turns on one single question – whether, under the undisputed facts and admissible evidence asserted by Plaintiff, there is a material issue of fact as to whether the "irreparable injury to the corporation is threatened or being suffered" by reason of oppression of a shareholder. *See* I.C. § 30-1-1430(2). Even Plaintiff recognizes that this is the only question before the Court for purposes of this motion for summary judgment. *See* Plaintiff's Responsive Brief, p. 2 ("The issue today is whether that evidence of oppression . . . creates a material issue of fact as to whether the oppression threatens the corporation with irreparable harm.").

1. The Phrase "Irreparable Injury To The Corporation Is Threatened Or Being Suffered" Is Well-Defined

Oddly, Plaintiff begins his briefing by asserting that "Defendants offer no proposed definition of this element." *Id.* To the contrary, the Corporation's supporting memorandum offered abundant authority as to how courts in Idaho and around the country have applied the terms "irreparable injury," "irreparable harm," and a "threat" of such injury. While there are relatively few opinions discussing these terms in the context of dissolution statutes, there are abundant authorities defining these terms in the context of preliminary injunction motions, motions for appointment of a receiver and other requests for equitable relief. Courts have repeatedly defined "irreparable injury" or "irreparable harm" as harm that is not remote or speculative, but actual and imminent and for which monetary damages cannot adequately compensate. For example, just a few months ago, Judge Winmill explained that "[a]n irreparable injury is defined as an actual and concrete harm, or the imminent threat of an actual and concrete

harm" and that a "threat of harm is not 'imminent,' if it is based upon remote possibilities or mere speculation." *Mennick v. Smith*, 2009 WL 1783505, *3 (D. Idaho 2009). Judge Williams offered that same definition in *Gammett v. Idaho State Bd. of Corrections*, 2007 WL 2186896, *2 (D. Idaho 2007).[5] Another court recently described the concept as follows:

> While the concept of irreparable harm may be difficult to define, it is abundantly clear that the impending harm must be certain and great, and it must be actual and not theoretical. . . . . Additionally, the harm must be imminent . . . . [not] merely feared as liable to occur at some indefinite time. . . . Finally, it is well settled that economic loss does not, in and of itself, constitute irreparable harm. . . . The only instance where economic loss can give rise to irreparable harm . . . is when such loss threatens the very existence of the movant's business.

TD Intern., LLC v. Fleischmann, 639 F.Supp.2d 46, 48 (D. D.C. 2009) (internal citations and quotations omitted).

The Idaho Supreme Court has also defined "irreparable" injury as an "injury which cannot be adequately compensated for monetarily." *See Utah Power & Light Co. v. Idaho Public Utilities Com'n*, 107 Idaho 47, 51 (1984) (citing Black's Law Dictionary). In *Hall v. Glenn's Ferry Grazing Ass'n*, 2006 WL 2711849 (D. Idaho 2006), the only Idaho authority discussing the corporate dissolution statute's "irreparable injury to the corporation" requirement, the court specifically held that there can be no threat of irreparable injury where the conduct

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5 Notably, many of these cases involve motions for preliminary injunction, which is a equitable remedy similar in many ways to a request for dissolution. In fact, the test for judicial dissolution should require an even stronger showing of an actual, imminent and non-speculative injury than in the preliminary injunction context. The purpose of a preliminary injunction is to preserve the status quo, and a preliminary injunction can later be vacated if it turns out that a party has been wrongfully enjoined. An order of judicial dissolution permanently dissolves a corporation, leading to all kinds of tax and other business consequences.

complained of could be remedied through an action at law. *Id.* at *11 ("Hall could have filed suit to set them aside, and the availability of that option means that the corporation was not faced with a threat of irreparable harm that required its dissolution.").

Plaintiff's Responsive Brief does not address these authorities, but instead simply offers his own definition of "irreparable injury" without citation to any authority.[6] Indeed, Plaintiff's suggested definition of "harm that cannot be repaired and which harm involves a material financial amount" is directly contrary to the well-settled rule that a monetary injury cannot constitute irreparable injury. *See, e.g., Utah Power & Light Co. v. Idaho Public Utilities Com'n*, 107 Idaho 47, 51 (1984) (defining "irreparable" damage as an "injury which cannot be adequately compensated for monetarily"); *Council v. Department of Veterans Affairs*, 2010 WL 98984, *2 (M.D. Fla. 2010) ("By definition, monetary injury is not irreparable as it is susceptible to repair by the payment of money."); *Emily's List v. Federal Election Com'n*, 362 F.Supp.2d 43, 52 (D. D.C. 2005) ("[F]inancial harm alone cannot constitute irreparable injury unless it threatens the very existence of the movant's business."). Even "[t]he United States Supreme Court has ruled definitively that irreparable injury must be something more than monetary injury." *In re Florida West Gateway, Inc.*, 993 F.2d 1543, 1993 WL 185761, *4 (5th Cir. 1993) (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974), which held that "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be

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6 In fact, Plaintiff does not cite a single case authority in his entire Responsive Brief other than a few cases in the final section of his Responsive Brief addressing whether the Court has the equitable authority to order relief short of dissolution.

available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.").

In light of the abundant authorities defining "irreparable injury," the court should reject Plaintiff's proposed definition and apply the definition adopted by courts in Idaho and around the country.

2. Plaintiff Has Not Alleged That Any Irreparable Injury Has Already Occurred

Plaintiff could avoid summary judgment by either establishing that some irreparable injury to the Corporation is "being suffered" or that irreparable injury "is threatened." Plaintiff makes no contention that any irreparable injury has already been suffered. Rather, Plaintiff argues only that irreparable injury to the Corporation is threatened by a potential risk of future tax liability.

3. Plaintiff Cannot Establish A Threat Of Irreparable Injury To The Corporation, And The Potential Risk Of Tax Liability Asserted By Plaintiff Is Purely Speculative

The crux of Plaintiff's argument is that the transactions with Gertrude McCann expose the Corporation to some potential risk of tax liability in the event of an audit by a taxing authority. This assertion does not establish a material issue of fact that the Corporation is threatened with irreparable harm. First, this assertion of a possible risk of tax liability in the future in the event that the IRS someday performs an audit is pure speculation and does not constitute a threat of irreparable injury. *See Mennick v. Smith*, 2009 WL 1783505, *3 (D. Idaho 2009) (explaining that "[a]n irreparable injury is defined as an actual and concrete harm, or the imminent threat of an actual and concrete harm" and that a "threat of harm is not 'imminent,' if it is based upon remote possibilities or mere speculation"); *see also* Black's Law Dictionary (7th ed. 1999) (defining "threat" as "[a] communicated intent to inflict harm or loss on another")

(emphasis added). There is no evidence that any taxing authority has communicated its intention to audit the Corporation or that any tax liability is otherwise imminent. Rather, Plaintiff offers only the speculative assertion that an audit may occur at some point in the future and may result in some unspecified tax liability.

The speculative nature of Plaintiff's assertion could not be more apparent. Plaintiff is contending that the IRS might someday question amounts "claimed as deductions on the Corporation's tax returns for questionable payments to Gertrude McCann." *See* Karen Ginnett Aff., ¶ 3. However, Plaintiff does not even quantify what amount the Corporation has "claimed as deductions on the Corporation's tax returns" related to the so-called "questionable transactions" with Gertrude McCann.[7] More importantly, Plaintiff does not offer any explanation of how much tax liability might result from an audit.

Plaintiff has the burden of proof to establish that "irreparable injury to the corporation is threatened or being suffered," and the failure to raise an issue of fact as to this element makes summary judgment appropriate. *See Thomas*, 138 Idaho at 205 (explaining that summary judgment is appropriate where "the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial"). Plaintiff's burden is to establish the element of irreparable injury, and that burden is not satisfied by a speculative assertion that the IRS might possibly assess some unquantified penalty based on some unquantified tax deductions taken by the Corporation.

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7 Citing Mr. Reinstein's Affidavit, Plaintiff asserts that "[s]ince January 1, 2001, the Corporation has advanced $282,036 for the benefit of Gertrude McCann." *See* Plaintiff's Responsive Brief, p. 4. However, neither Plaintiff nor his expert gives any explanation of what portion of this amount has been claimed as deductions on the Corporation's tax returns.

Plaintiff simply fails in his burden of establishing injury in any quantifiable amount, much less an "irreparable injury" in an amount that the Corporation, which Plaintiff asserts is worth over $20 Million, could not easily pay.

Moreover, even assuming as true Plaintiff's contention that an IRS audit, if one were ever to occur, might result in tax penalties, those penalties do not constitute irreparable injury. As explained above in Section III. A. 1, a monetary injury, as a matter of law, does not constitute an irreparable injury.

Finally, the availability of a remedy at law establishes the lack of irreparable injury to the Corporation. *See Hall v. Glenn's Ferry Grazing Ass'n*, 2006 WL 2711849 (D. Idaho 2006) (explaining that there can be no threat of irreparable injury where the conduct complained of could be remedied through an action at law; "the availability of that option means that the corporation was not faced with a threat of irreparable harm that required its dissolution"). Here, Plaintiff asserts that the corporate Directors have allowed the Corporation to participate in transactions with Gertrude McCann that subject the corporation to tax penalties. However, if there is any merit to that contention, Plaintiff could bring a derivative action to remedy those alleged wrongs.

Plaintiff contends that bringing a derivative action would "consume the energy and resources of the Corporation and its principals." That argument, however, would extend to any other case and would emasculate the rule that equity will not interfere where there is an adequate remedy at law. The law is clear that there is no irreparable injury where the alleged injury is monetary or could be remedied by an action at law. Thus, Plaintiff's contention that the actions of the Directors subject the corporation to a potential monetary penalty cannot, as a matter of law, constitute threat of irreparable injury to the Corporation.

4. There Is No Irreparable Injury With Regard To The Speculative Assertion That Gertrude McCann Will Not Be Able To Pay Her Receivable To The Corporation

Plaintiff now offers a new and creative theory that the Corporation is threatened with irreparable injury because of the possibility that Gertrude McCann might not be able to pay her receivable to the Corporation. This argument fails for the same reasons explained above. First, the potential injury is monetary and could be remedied by an action at law.

More importantly, Plaintiff's assertion is purely speculative and lacks any evidentiary support. Plaintiff has presented no evidence of Gertrude McCann's financial status other than Plaintiff's admission that she owns approximately 100 acres of real property. Gertrude McCann's obligation to the Corporation, especially when offset by the amount owed to her by the Corporation, is relatively insubstantial. Gertrude McCann owes the Corporation approximately $198,945. *See* Affidavit of Dennis Reinstein, ¶ 4.2. The majority of that obligation was incurred long before 2001. The amount owed by Gertrude McCann to the Corporation is mostly offset by the amount owed by the Corporation to Gertrude McCann for rent. Thus, any assertion that Gertrude McCann would not be able to pay her obligation to the Corporation is purely speculative and not supported by any evidence.

5. The Corporation's Cash Flow And Ability To Pay Dividends Is Irrelevant To This Motion For Summary Judgment

Much of Plaintiff's argument to date and the affidavit of Mr. Reinstein are directed at the Corporation's cash flow and ability of the Corporation to pay dividends. For example, the Exhibits to Mr. Reinstein's affidavit purport to set forth the Corporation's "cash available to pay

dividends."[8] The Corporation's ability or inability to pay dividends is not relevant to this motion for summary judgment, which is limited to the statutory requirement that "irreparable injury to the corporation is threatened or being suffered" before judicial dissolution of a corporation. Whether a shareholder receives the dividends to which he believes he is entitled has nothing to do with whether the corporation is threatened with irreparable harm.

The dividend issue is a red herring and, in any event, Plaintiff has no entitlement to dividends at all. Ultimately, the decision to issue or not issue dividends is in the discretion of the directors of a corporation. *See* Idaho Code § 30-1-640 ("A board of directors may authorize and the corporation may make distributions to its shareholders subject to restriction by the articles of incorporation and the limitation in subsection (3) of this section.") (emphasis added); *see also Wabash Ry. Co. v. Barclay*, 280 U.S. 197, 50 S. Ct. 106 (1930) (holding that prior to a declaration of dividends, there is no vested right to share in the assets of the corporation; the stockholder's right is merely to have the assets devoted to the proper business of the corporation and to receive from the current earning or accumulated surplus such dividends as the directors, in their discretion, may declare); *Eisner v. Macomber*, 252 U.S. 189, 40 S. Ct. 189 (1920) (holding that, as a general rule, the mere fact that there are net profits or earnings, or that a surplus has accumulated, does not entitle the shareholder to dividends, but rather shareholders have no

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8 Plaintiff's assertion that shareholders are entitled to dividends in the amount the corporation's positive cash flow is absurd, especially in the current market of declining real estate values. If the Corporation were to issue dividends anywhere near the amount of its profits or positive cash flow, it would leave itself dangerously vulnerable to fluctuating real estate values and the risk of a substantial change in cash flow., i.e., if another tenant, like Tidymans, goes bankrupt.

individual or property interest in the profits of the corporation and are not entitled to any portion of the accumulated earnings until the declaration of a dividend or its equivalent).

6. The Question Of Whether This Court Can Order An Equitable Remedy Short Of Dissolution Is Irrelevant To This Motion For Summary Judgment

The final section in Plaintiff's Responsive Brief is dedicated to whether this Court could order an equitable remedy short of dissolution, i.e., a corporate reorganization or spin-off. This is another red herring. Idaho Code § 30-1-1430(2) authorizes judicial dissolution of a corporation only when specific statutory requirements are met, including that "irreparable injury to the corporation is threatened or being suffered." The statute makes no mention of any other remedy. In any event, the question of whether the statute or this Court's equitable powers allow some other form of remedy should be left for another day. If Plaintiff cannot establish that "irreparable injury to the corporation is threatened or being suffered," Plaintiff is entitled to no remedy under the statute.

V. CONCLUSION

Summary judgment is appropriate because Plaintiff cannot establish that "irreparable injury to the corporation is threatened or being suffered." The best Plaintiff can come up with is that the Corporation may someday be required to pay some unquantified amount of tax liability. This assertion is purely speculative in that it relies on a long string of consecutive contingencies that would have to occur prior to any injury being suffered. First, Plaintiff's theory of injury would only occur in the event of a corporate audit by a taxing authority, and no taxing authority has given any indication that an audit is forthcoming. Second, even if an audit were to occur, Plaintiff's theory assumes that the auditor would agree with Plaintiff's assertion of tax fraud. Third, even if an audit were to occur and even if the taxing authority found tax fraud, Plaintiff's theory assumes that an audit would result in a significant tax penalty – a penalty that Plaintiff

does not even attempt to quantify. Fourth, Plaintiff's theory assumes that a tax penalty would be so large that that Corporation, which has been profitable each of the last seven years and which Plaintiff values at over $20 Million, could not pay it.

In addition to this host of contingencies that makes plaintiff's theory of irreparable injury wholly speculative, Plaintiff's argument is simply that the Corporation might someday be subjected to a monetary tax penalty. A monetary injury, however, does not constitute irreparable injury as a matter of law. Finally, Plaintiff's speculative theory of injury, even if it were to occur, is not an irreparable injury in that it could be compensated for by an action at law. For each of these reasons, Plaintiff has failed to raise a material issue of fact as to the element that "irreparable injury to the corporation is threatened or being suffered." Accordingly, summary judgment should be granted in favor of Defendants.

DATED THIS 18th day of February, 2010.

MCDEVITT & MILLER LLP

By _____
Charles F. McDevitt, ISB No. 835
Attorneys for Nominal Defendant McCann Ranch & Livestock Co.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of February, 2010, I caused to be served a true copy of the foregoing REPLY REPLY MEMORANDUM IN SUPPORT OF MCCANN RANCH'S MOTION FOR SUMMARY JUDGMENT by the method indicated below, and addressed to each of the following:

Timothy Esser ESSER & SANDBERG, PLLC 520 East Main Street Pullman, WA 99163 [Attorneys for Plaintiff]	X U.S. Mail, Postage Prepaid ___ Hand Delivered ___ Overnight Mail X E-mail ___ Telecopy: 509.334.2205
Andrew Schwam SCHWAM LAW FIRM 514 South Polk, #6 Moscow, ID 83843 [Attorneys for Plaintiff]	X U.S. Mail, Postage Prepaid ___ Hand Delivered ___ Overnight Mail X E-mail ___ Telecopy
Michael E. McNichols CLEMENTS BROWN 321 13th Street P.O. Box 1510 Lewiston, ID 83501-1510 [Attorneys for Defendant Gary Meisner]	___ U.S. Mail, Postage Prepaid ___ Hand Delivered ___ Overnight Mail X E-mail ___ Telecopy: 208.746.0753
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,

Plaintiff,

v.

WILLIAM V. McCANN, JR., and GARY E. MEISNER, individually as a director of McCann Ranch Livestock Company, Inc., and as a shareholder of McCann Ranch & Livestock, Inc., in his capacity as Trustee of the William V. McCann, Sr. Stock Trust,

Defendants,

McCANN RANCH & LIVESTOCK COMPANY, INC.,

Nominal Defendant.

No. CV08-01226

PLAINTIFF'S RESPONSE TO DEFENDANT McCANN RANCH & LIVESTOCK'S MOTION TO STRIKE

917

Rules of Evidence

Rules 702 through 705 are the same as their federal counterparts, and the same as the expert witness rules followed in the State of Washington.

Rule 703, Basis of Opinion Testimony by Experts:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. **If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.**

As noted in Washington Practice, Volume 5B Evidence:

> The admissibility of an expert's opinion under Rule 703 should not be confused with the weight of that opinion after it is admitted as evidence.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion.

Washington Practice, Volume 5, at page 287-88

> Rule 705 allows an expert to state an opinion or inference, with reasons, without prior disclosure of the underlying facts or data, unless the court requires otherwise. . . .
>
> Rule 705 applies only to the testimony of an *expert* witness and has no effect upon prerule foundation requirements with regard to lay testimony.

Dorothy Snowball Affidavit / Opinions

In moving for summary judgment, the defense has filed the affidavit of their expert, CPA Dorothy Snowball. She notes in Paragraph 5 she is providing expert opinion testimony. Her opinions include:

> I understand that an allegation has been made by Plaintiff in this litigation that the Corporation is being irreparably harmed as a result of the management of the Corporation. Based upon my knowledge of the financial affairs of the corporation, I know of no basis for that allegation. (Snowball affidavit, paragraph 9)

> . . . . It is my understanding that Plaintiff alleges these payments subject the Corporation to liability for tax fraud. I see no basis for this allegation. . . . The amount paid to Gertrude McCann for maintenance and repairs to the property is an amount which the Board of Directors and Mrs. McCann have determined is a reasonable amount to reimburse her for her time, and the maintenance and repairs to the property. In my opinion, this is a legitimate expense of the corporation and does not expose the Corporation to any risk of liability for tax fraud. (Snowball affidavit, paragraph 16)
>
> Neither the Idaho State Tax Commission nor the IRS have ever objected to . . . . the payments to Gertrude McCann for the maintenance and repairs to the property upon which she resides. (Snowball affidavit, paragraph 17)
>
> Even if the IRS were to question these payments, the only conceivable consequence would be the time involved in satisfying the IRS that these expenses are reasonable, and legitimate, deductible expenses of the Corporation. (D. Snowball affidavit, paragraph 18)
>
> . . . . Neither the IRS nor the State Tax Commission have questioned the depreciation deductions nor the interest income reported by the Corporation on the receivables from the McCann Estate and Gertrude McCann since that settlement was reached with the IRS. (Snowball affidavit, paragraph 20)
>
> It is my understanding that Plaintiff seeks dissolution of the Corporation and a distribution of assets of the Corporation to shareholders. It is my opinion that dissolution of the corporation and the distribution of assets of the Corporation to shareholders in redemption of stock would have potentially devastating tax consequences to the Corporation. . . . (Snowball affidavit, paragraph 26)

Dorothy Snowball's opinions are based upon what she personally knows of the transactions, for example, having been involved in the preparation of promissory notes, what the corporate directors have told her (hearsay), and her knowledge of the "financial records". The defense believes that this information provides an adequate foundation for Ms. Snowball's opinions, yet characterizes the opinions offered by Plaintiff's expert as lacking sufficient foundation. As noted, Rule 705 does not require an expert's opinion to include the underlying facts/foundation, unless so ordered by the court. Nevertheless, Plaintiff's affidavits in great

detail disclose the foundation for their opinions. Plaintiff's experts reviewed the following financial material:

> the state and federal income tax returns, trial balances, income statements and balance sheets from 1996 through 2008, the 706 estate tax return for the William McCann Sr. Estate, the general ledgers for the years 2001 through 2008, the QuickBooks records since 2004, minutes of the shareholder and director meetings, as provided since 1997, corporate resolutions for these years, the Articles of Incorporation and Bylaws of the Corporation, the work papers of Dorothy Snowball, as provided, including the supplemental papers per the Court's order and other documents provided by Defendants.

Plaintiff's experts reviewed the detailed explanations of the transactions at issue, given by the participants -- William McCann, Jr., Gary Meisner, Lori McCann, Gertrude McCann and Dorothy Snowball:

> I have reviewed the deposition testimony of William McCann, Jr., Gary Meisner, Lori McCann, Gertrude McCann and Dorothy Snowball. I have also reviewed the summary judgment affidavits recently filed by the defense, those of Gary Meisner, Dorothy Snowball and William McCann, Jr. and James Schoff.

Further, Plaintiff's experts reviewed the corporate resolutions and minutes of the corporate meetings at which these transactions were discussed, explained, and agreed to. Defendants' assertion that Plaintiff's opinions lack foundation lacks merit.

As noted in Washington Practice, one should not confuse admissibility with weight. The weight should be decided at trial. Today, the affidavits should be admissible. This point was clearly made by the Idaho Supreme Court in Hines v. Hines, 129 Idaho 847; 934 P.2 20 (1997), a case in which the trial court granted the defendant summary judgment dismissal on the issue of fraud. The facts of Hines are extremely similar to McCann. The trial court's summary judgment dismissal was reversed on appeal because the Supreme Court held the trial court confused

admissibility with weight and wrongfully rejected the affidavits of appellant's expert accountants, as the court explained at page 852:

> In an attempt to demonstrate that Linda's statements were not true, William's expert witness in accounting filed three affidavits and supporting financial calculations. The district court summarily struck the first affidavit, explained in a fair amount of detail his reasons for disregarding the second, and summarily disregarded the third as irrelevant and inconsistent with the second. We have determined that it was error for the district court to disregard at least the second affidavit and have concluded that the second affidavit presents a genuine issue of material fact that precludes the granting of summary judgment.
>
> In the second affidavit, William's expert challenges the manner in which the corporation was showing its profits and losses. **He particularly focuses on the characterization of certain of Linda's personal expenses as business expenses, the propriety of certain loans Linda apparently withdrew from the corporation**, the manner in which the corporation booked depreciation expenses, and Linda's salary draw, which was in excess of the amount set forth in the property settlement agreement. We believe this demonstrates a genuine issue of material fact as to whether the corporation and Linda were being honest in their financial calculations when Linda told William that the corporation was showing a loss every month. (emphasis supplied)
>
> The district court refused to consider this second affidavit, reasoning that the evidence presented in the affidavit was inadmissible because there was no foundation and, based upon the district court's knowledge of accounting principles, the expert's basis for his opinion was "flawed or fundamentally unsound." We recognize that a district court is required to determine the admissibility of evidence prepared by an expert witness by examining the foundational issues before ruling on a motion for summary judgment. Helca Mining Co. v. Star-Morning Mining Co., 122 Idaho 778, 839 P.2d 1192 (1992). However, the district court in the present case was not using "foundation" in the sense that the expert had not properly identified his qualifications or the basis for his opinions. See I.R.E. 702, 703. Rather, the district court was using the term "foundation" to criticize the facts considered and opinions held by the expert. This is nothing more than a weighing of evidence and a determination of the witness's credibility, which is improper in a motion for summary judgment. See Sohn v. Foley, 125 Idaho 168, 868 P.2d 496 (Ct.App. 1994). Consequently, we have concluded that it was error for the district court to strike the second affidavit prepared by William's expert.

The defense memorandum summarizes dicta from a string of citations. But when one reads the actual cases, learns the facts and the Court's holding, the cited authority actually supports Plaintiff's position. For example, in Specht v. Jensen, 853 F.2d 805 (10th Cir. 1988), which the defense cites for the proposition that "federal courts condemn the practice of attempting to introduce law into evidence" (Defendant's Memorandum page 5) one learns that the plaintiff's had suffered an illegal search. They called an attorney as an expert and he testified regarding whether consent had legally been given and whether illegal searches had occurred. The trial court allowed this testimony on the ultimate opinion, which was reversed by the Court of Appeals, holding that testimony on ultimate issues of law is inadmissible as it would tend to confuse the jury if one side's legal expert testified that the law favored the plaintiff and the other side's legal expert said that the law favored the defendant and the judge set forth a third legal standard. It should be noted, that in this equitable, non-jury action, this danger, which was a primary basis for the court's holding, does not apply. The court also stated at pages 809-810:

> The line we draw here is narrow. **We do not exclude all testimony regarding legal issues.** We recognize that **a witness may refer to the law** in expressing an opinion without that reference rendering the testimony inadmissible. Indeed, a witness may properly be called upon to aid the jury in understanding the facts in evidence **even though reference to those facts is couched in legal terms**. For example, we have previously held that a court may permit an expert to testify that a certain weapon had to be registered with the Bureau of Alcohol, Tobacco, and Firearms. United States v. Buchanan, 787 F.2d 477, 483 (10th Cir. 1986). In that case, however, the witness did not invade the court's authority by discoursing broadly over the entire range of the applicable law. Rather, the expert's opinion focused on a specific question of fact. See also Huddleston v. Herman & MacLean, 640 F.2d 534, 552 (5th Cir. 1981), modified on other grounds, 459 U.S. 375, 103 S. Ct. 683, 74 L. Ed. 2d 548 (1983) (attorney expert in securities law allowed to testify that a statement in a prospectus was standard language for the issuance of a new security because this information helped the jury weigh the evidence of defendants' scienter); United States v. Garber, 607 F.2d 92 (5th Cir. 1979) (trial court erred in refusing to let experts on income tax law testify regarding whether failure

> to report funds received for sale of blood plasma constituted income tax evasion).
>
> These cases demonstrate that **an expert's testimony is proper under Rule 702 if the expert does not attempt to define the legal parameters within which the jury must exercise its fact-finding function.** However, when the purpose of testimony is to direct the jury's understanding of the legal standards upon which their verdict must be based, the testimony cannot be allowed. In no instance can a witness be permitted to define the law of the case. (emphasis added) (footnote omitted)

In our case, our experts have not given an opinion on the ultimate issue, i.e., they have not testified that these transactions constitute fraud. They have set forth the facts and, quite appropriately the standards which a knowledgeable tax auditor would apply. In this regard, their affidavits are clearly admissible under relevant federal authority. For example, in U.S. v. Bedford, 536 F.3d 1148 (10th Cir. 2008), the defendant was charged with various crimes related to tax fraud. The government presented an expert witness, an IRS agent, to testify concerning the deductibility of expenses claimed by defendant and the potential inaccuracy of defendant's tax returns. The trial court allowed this testimony. The Court of Appeals ruled that this was appropriate, stating at page 1158:

> "[e]xpert testimony by an IRS agent which expresses an opinion as to the proper tax consequences of a transaction is admissible evidence", US v. Windfelder, 790 F.2d 576, 581 (7th Cir. 1986), so long as the expert does not "directly embrace the ultimate question of whether [the defendants] did in fact intend to evade income taxes," US v. Sabino, 274 F.3d 1053, 1067 (6th Cir. 2001).

As we stated in a recent unpublished opinion:

> "We agree that a properly qualified IRS agent may analyze a transaction and give expert testimony about its tax consequences." U.S. v. Wage, 203 F.App'x 920, 930 (10th Cir. 2006)

And at page 1158:

> An expert may not state legal conclusions drawn by applying the law to the facts," but "[a]n expert may ... refer to the law in expressing his or her

opinion." (Citing A.F. ex rel Evans v. Independent School District No. 25, 936 F.2d 472, 476 (10th Cir. 1991).

With these principles in mind, we will now repeat the defense objections and provide a response to each.

Defense Objection

¶ NO.	STATEMENT	OBJECTION
2	I have assisted Dennis Reinstein in this Matter and have reviewed all the	The statements lack the necessary foundation for admissibility . . . .

Plaintiff's Response

Rule 705 does not require the expert to set forth the facts upon which he relies unless so ordered. Nevertheless, Karen Ginnett states that she reviewed all of the material mentioned in Mr. Reinstein's affidavit and Mr. Reinstien's affidavit sets forth that information in detail. In fact, there is a far more detailed foundation for the opinions of Plaintiff's expert than simply the "financial records" relied upon by defense expert Snowball.

Defense Objection

¶ NO.	STATEMENT	OBJECTION
3	The term "fraud" as used in the tax Law, means an actual and deliberate	These statements constitute improper legal argument and . . . .

Plaintiff's Response

Ms. Ginnett's affidavit is appropriate under the ruling in U.S. v. Bedford, infra supra. Ms. Ginnett is not telling this court what the law should conclude, she is telling the court what standards are applied by a knowledgeable tax auditor of the State of Idaho Tax Commission in determining whether the characterization by a corporation of financial transactions is proper. As CPA Ginnett states in her affidavit, she spent seven years as an auditor and this is the standard

she applied. This should be compared to Dorothy Snowball's affidavit which essentially gives the same opinion (although opposite). Ms. Snowball states that the transactions are proper and provides essentially no basis other than: 1) this happens to be her opinion, and 2) the tax authorities have not objected. As pointed out in Plaintiff's affidavits, the tax authorities have not objected most likely because they in fact have not audited since 1986.

Defense Objection

¶ NO.	STATEMENT	OBJECTION
4	In appears that during the 1986/1987 Audit, the taxing authorities did review	The statements lack the necessary foundation for admissibility in . . . .

Plaintiff's Response

The defense's objection is confusing – in actuality Plaintiff's expert is not expressing an opinion, but rather is repeating factual information set forth in the defense expert's affidavit. To the extent that Ms. Ginnett's statements can be construed as an opinion, the rule is that "the opinion based upon the opinion of another expert is admissible, so long as the testifying expert reasonably relied upon the opinion." Washington Practice, Opinion Based upon Other Opinions, Volume 5B, page 245, accord, Long v. Hendricks, 109 Idaho 73, 705 P.2d 78 (Ct. App. 1985).

Defense Objection

¶ NO.	STATEMENT	OBJECTION
5.	The fact that Gertrude McCann reports Some income on her tax return does not change the question	These statements constitute improper legal argument and improper assertions . . . .

The defense presents an affidavit in which their expert repeatedly expresses opinions such as "it is my understanding that Plaintiff alleges these payments subject the corporation to liability for tax fraud. I see no basis for this allegation . . . . In my opinion this is a legitimate

business expense to the corporation and does not expose the corporation to any risk of liability for tax fraud", Snowball affidavit paragraph 16. So does the defense object when Plaintiff's expert, who reviews in detail the same transactions, not only how they are characterized on the books, but how the participants explain them in their depositions and affidavits, expresses a counter opinion?. Our experts, licensed CPAs, simply dispute the expert testimony offered by Ms. Snowball, and bolster their opinions with far greater factual foundation.

Defense Objection

¶ NO.	STATEMENT	OBJECTION
6.	It is my opinion, and for the reasons set Forth in detail in Dennis Reinstein's affidavit	The statements lack the necessary foundation for admissibility in that they do not set forth . . . .

Plaintiff's Response

In fact the foundation for his opinion is given in far greater detail than the opinion of Ms. Snowball which Plaintiff's experts are responding to. And as noted, Rule 705 does not even require an expert to set forth in detail the underlying facts that form the foundation of their opinion unless so ordered by the court. We don't believe the court, just the same as a jury, is necessarily conversant with accounting standards. We don't believe it would be appropriate for a court to attempt to take judicial notice of accounting standards – such as the trial judge did in Hines. These issues are appropriate for expert testimony. There happens to be conflicting expert testimony and the proper weight must be decided at trial, not on summary judgment.

Objections to the affidavit of Dennis Reinstein

Defense Objection

¶ NO.	STATEMENT	OBJECTION
4.1	Gertrude McCann Compensation. . . .	This Court has indicated that it will

only consider facts subsequent to January 5, 2001 . . . .

To begin with, the Defendants have filed summary judgment affidavits which are replete with specific factual assertions concerning pre-2001 events. When we asked at deposition about these events, they strenuously objected, asserting that the Court's order prohibited discovery. Has the defense not waived that objection, has the defense not opened the door at least in this summary judgment proceeding, when it files affidavits in which, for example, Defendant McCann discusses the formation of the corporation in 1974, his activities as president since 1997, his parents' actions between 1974 and the 1986 audit, the results of the 1986-1987 audit, the corporate actions taken post-1987 and pre-2001 in response thereto, and, in particular, the actions of the directors at the September 6, 2000, board meeting (William McCann affidavit paragraph 4, 8, 11, 12, 13, 14 and 15).

Second, Evidence Rule 401 defines relevant evidence to mean: "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than would be without the evidence." E.R. 402 provides, "all relevant evidence is admissible except as otherwise provided . . . ."

We allege that the post-2001 transactions between the Corporation and Gertrude McCann serve no legitimate corporate purpose but rather are a continuation of the Defendants' oppression of Plaintiff. The Defendants dispute this. (Although, for purposes of their summary judgment motion they admit sufficient evidence of oppression can be omitted.) We assert that the pre-2001 transactions, such as phony consulting fees, such as a voted down effort to provide a lifetime annuity, are relevant to explain that the post-2001 transactions have occurred because Plaintiff in fact had successfully put an end to the earlier misconduct. Such evidence is

admissible under the rules set forth in Aldape, Jr. v. Akins, 105 Idaho 254, 668 P.2d 130 (1983) wherein the Court stated at page 258:

> *Change of circumstances.* Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first. See Illustrations 10-12.
>
> Illustration (12). The government fails in an action against a defendant under an antitrust statute for lack of adequate proof that the defendant participated in a conspiracy to restrain trade. The government is not precluded from a second action against the same defendant in which it relies on conspiratorial acts post-dating the judgment in the first action, **and may rely also on acts preceding the judgment insofar as these lend significance to the later acts.** [emphasis supplied]

We are not asking this Court to find that the pre-2001 payment of consulting fees by the Corporation to Gertrude McCann constitute oppression for which relief should be granted, we ask the Court to find that the post-2001 transfers to Gertrude McCann serve no legitimate purpose and are acts of oppression. Defendants dispute this. Defendants characterize them as proper. In determining how those post-2001 transactions should be characterized, it is relevant to learn that they were prompted by Plaintiff's successful effort to stop the continuation of the pre-2001 practices. William McCann, Jr. let his guard down when he candidly testified that the reasons for the post-2001 transactions were that his mother "needed the money."

And as Plaintiff's expert Ginnett states in her affidavit, an auditor in evaluating whether a transaction is fraudulent, must necessarily consider "the entire record of transactions." (Ginnett Affidavit paragraph 3)

Defense Objection

¶ NO.	STATEMENT	OBJECTION
4.2	Advances for Expenses	The time period before 2001 is Irrelevant in this action.

Plaintiff's Response

We make the same response and state further there is a detailed foundation laid -- the very detailed minutes of the directors meeting and resolutions adopted. To the extent factual assertions are made, they simply repeat what the Defendants admitted in their own affidavits.

Defense Objection

¶ NO.	STATEMENT	OBJECTION
4.6	I have asked Plaintiff's attorneys to ascertain what amount	The statements lack the necessary foundation for admissibility, irrelevant . . . .

Plaintiff's Response

Plaintiff's response details the "agreement" entered into between Defendant Meisner, William McCann, Jr. and Gertrude McCann whereby William McCann, Jr. and his wife, Lori, agreed to advance additional sums to Gertrude. Defense has refused to provide us with the balance purportedly owed by Gertrude to William McCann, Jr. (this is a different "debt" than the Corporation claims Gertrude owes it). But the fact is, upon Gertrude's death there apparently will be claims made against her estate not only by the Corporation, but by Defendant William McCann, Jr. as well. This is extremely relevant because Defendants assert that even if transfers by the Corporation to Gertrude are improper, the Corporation is not harmed because they can be recovered. There is a substantial threat that that simply is not accurate.

Defense Objection

¶ NO.	STATEMENT	OBJECTION
4.7	Gertrude McCann testified that she Does not owe the Corporation any money	Inadmissible hearsay and improper attempt to present hearsay testimony . . . .

Plaintiff's Response

Gertrude did in fact testify as alleged. This is not offered to prove the truth of the matter asserted therein, this is offered to prove that the Corporation's assertion, that it will have no difficulty in recovering the funds improperly transferred to Gertrude is in fact far from a certainty. And further, Defendants participated in the deposition – what the witness testified to, based on her own knowledge, is not hearsay. It's not "an out of court statement."

The Corporation claims it will recover the money from Gertrude. It is relevant that Gertrude has testified that she doesn't owe it.

Defense Objection

¶ NO.	STATEMENT	OBJECTION
4.7	I have been provided no Documentation or deposition testimony That would suggest that Gertrude	The statements lack the necessary foundation for admissibility . . . .

Plaintiff's Response

Defendants' shotgun objection is genuinely unhelpful. This witness has in fact laid a very detailed foundation of what he has reviewed – virtually every scrap of paper pertaining to the Corporation's business over the last ten years. In discovery we asked the Corporation to provide all documents relevant to the transactions with Gertrude. And in turn, our expert has reviewed those documents and notes there is nothing therein that suggests Gertrude and/or her husband claimed rent was owing.

Defense Objection

¶ NO.	STATEMENT	OBJECTION
5.1	In my opinion, the financial transactions a corporation has engaged in with Gertrude McCann	The statements lack the necessary foundation or admissibility, ...

Plaintiff's Response

The defense asserts that whether the Corporation's transactions with Gertrude are for a necessary business purpose or improper, is not relevant – this is a frivolous objection to the extreme. Likewise, their claim that the opinion lacks foundation ignores the detailed facts upon which Mr. Reinstein relies. They argue that his opinion is conclusory. It is a conclusion. That is what an opinion is.

Defense Objection

¶ NO.	STATEMENT	OBJECTION
5.2	Plaintiff's counsel has asked me to assume that an appropriate definition of "threat of irreparable harm"	The statements lack the necessary foundation for admissibility . . . .

Plaintiff's Response

Despite no case law analysis or statutory definition of the statutory element "threat of irreparable harm", Defendants object when we offer a suggested definition. And to ask our expert to assume this definition is certainly allowed under the rules. "An expert may base an opinion upon a hypothetical question, posed by counsel on direct examination." Opinions and Expert Testimony, Section 703.4 Washington Practice, Volume 5B, page 229.

Defense Objection

¶ NO.	STATEMENT	OBJECTION
6.1	If the business affairs of the corporation were selected for audit by either the Idaho State Tax	The statements lack the necessary foundation for admissibility . . . .

Plaintiff's Response

To the contrary, the facts in support of this opinion are set forth in detail.

Defense Objection

¶ NO.	STATEMENT	OBJECTION
6.3, 6.4, 6,4,1, 6.5.2	Further, as I understand a life estate, the life tenant retains rights and	These statements constitute Improper legal argument . . . .

Plaintiff's Response

To the contrary, valuation of a life estate, in comparison with the remainder interest, is a matter properly considered by CPAs utilizing IRS tables.

As to each of these objections, the defense is confusing weight with admissibility. They don't like our experts' opinion, but the opinions are based upon a detailed foundation.

CONCLUSION

Defendants' motion to strike should be denied. At trial the Court, as the fact finder, will determine what weight to give the competing opinions.

Frankly, that a closely held corporation transfers hundreds of thousands of dollars to the controlling director/shareholder's mother, for no legitimate corporate purpose, but rather because "she needs the money", at the very time cash flow won't allow dividends, threatens irreparable harm, whether or not the Corporation might someday recover the money and regardless of what any expert witness might opine.

DATED: This 22nd day of February 2010.

Esser & Sandberg, PLLC

By _____
Timothy Esser #6770

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February 2010, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,

Plaintiff,

v.

WILLIAM V. McCANN, JR., and GARY E. MEISNER, individually as a director of McCann Ranch Livestock Company, Inc., and as a shareholder of McCann Ranch & Livestock, Inc., in his capacity as Trustee of the William V. McCann, Sr. Stock Trust,

Defendants,

McCANN RANCH & LIVESTOCK COMPANY, INC.,

Nominal Defendant.

No. CV08-01226

PLAINTIFF'S CORRECTION / SUPPLEMENTAL AUTHORITY

A word was left out of the of the second sentence on page 10 of Plaintiff's Response to Defendant McCann Ranch & Livestock's Motion to Strike. The sentence should read:

934

> So **why** does the defense object when Plaintiff's expert, who reviews in detail the same transactions, not only how they are characterized on the books, but how the participants explain them in their depositions and affidavits, expresses a counter opinion?

In response to the dissolution element "threat of irreparable harm" the Court is asked to consider I.C.30-1-1434. Defendants McCann and Meisner could have, but were not required to institute the remedy provided by this statute. They could have elected to have the Corporation and/or themselves purchase Plaintiff's shares and if they could not have reached an agreement with Plaintiff concerning the "fair value" of his shares, the statute provides for that determination to be made by the Court. These Defendants have chosen not to implement the buyout remedy provided by this statute. Assume that they indeed have engaged in oppression, which for purposes of their summary judgment motion, they concede. The Defendants' position is that the Corporation has spent $250,000 in defending their personal oppression and argue that despite that oppression, Plaintiff is not entitled to a remedy. The Defendants could have saved the Corporation the $250,000 (probably in excess of $400,000 by the time trial is completed) of attorney fees prompted by their oppression, and could further save the Corporation from the damage they allege the remedy of dissolution will cause (adverse tax consequences) by simply providing the Plaintiff the statutory remedy set forth in I.C. 30-1-1434. And if in fact they have oppressed Plaintiff, this is only equitable.

In the alternative, if the Defendants have in fact perpetrated oppression and yet do not want to provide Plaintiff this statutory remedy, they could have, and should have, defended themselves in this action at their own expense. This Corporation in fact is irreparably harmed by spending $250,000 to defend Defendants McCann and Meisner's acts of oppression, when that expense could have and should have been avoided by implementation of the statutory alternate to distribution. The Defendants may be motivated by I.C. 30-1-1434(5):

> . . . .If the court finds that the petitioning shareholder had probable grounds for relief under section 30-1-1430(2)(b), Idaho Code, it may award to the petitioning shareholder reasonable fees and expenses of counsel and of any experts employed by him.

In any event, for purposes of the Defendants' summary judgment memorandum, the facts are that they have caused the Corporation to spend in excess of $250,000 defending their oppressive conduct. The Corporation could have avoided this expense if the Defendants had not committed oppression. The Corporation could have avoided this expense if the Defendants paid their own fees. The Corporation could have avoided this expense if the Defendants had offered Plaintiff a buyout of his shares pursuant to the statutorily authorized procedure. The Corporation is irreparably harmed by having lost in excess of $250,000 caused by the Defendants oppression and their refusal to accept personal responsibility therefore. The Court may chose to consider that in the context of an Idaho closely held corporation in which the controlling shareholders have engaged in oppression, the corporate dissolution statute may in fact only require one element: oppression. Because if those committing the oppression refuse to implement the statutory buyout of Plaintiff's shares, and at the same time cause the Corporation to pay to defend their oppressive conduct, the Corporation is irreparably harmed.

DATED: This 23rd day of February 2010.

Esser & Sandberg, PLLC

By _____
Timothy Esser #6770

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February 2010, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

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Timothy Esser

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN, PLAINTIFF, V. WILLIAM V. McCANN, JR., AND GARY E. MEISNER, INDIVIDUALLY AND AS DIRECTOR OF McCANN RANCH & LIVESTOCK COMPANY, INC., AND AS A SHAREHOLDER OF McCANN RANCH & LIVESTOCK COMPANY, INC., IN HIS CAPACITY AS TRUSTEE OF THE WILLIAM V. McCANN SR. TRUST, DEFENDANTS, McCANN RANCH & LIVESTOCK COMPANY, INC., NOMINAL DEFENDANT.	CASE NO. CV 08-01226C MEMORANDUM AND ORDER CONCERNING VARIOUS MOTIONS filed in chambers March 5, 2010 3:10 p.m. Greg D. Carey, Sr. Dist. Judge

This is an on-going dispute between Plaintiff Ronald R. McCann and his brother, Defendant William V. McCann, Jr., concerning the operation of McCann Ranch & Livestock Company, Inc., a closely-held Idaho corporation created by their father many years ago. An earlier case involving this dispute was decided against Ronald McCann by the Idaho Supreme Court in *McCann v. McCann,* 138 Idaho 228, 61 P.3d 585 (2002).

In the current case this court dismissed Ronald McCann's first cause of action, leaving only a claim for corporate dissolution. The case is set for a non-jury trial in

July 2010.

The defendants now have moved for summary judgment dismissing the dissolution claim. They also have moved to strike some of the material contained in the plaintiff's affidavits opposing the motion for summary judgment. The plaintiff has moved to allow him to file an additional document, to which the defendants have objected. The court indicated that it would hear the motion to strike and the motion to file an additional document even though they were filed just a short time before the hearing date scheduled for the motion for summary judgment.

For the reasons explained below, the motion for summary judgment will be granted.

PRELIMINARY MOTIONS

PLAINTIFF'S MOTION TO FILE ADDITIONAL DOCUMENT.

Plaintiff Ronald McCann seeks to file a four page document entitled "Plaintiff's Correction/Supplemental Authority." In the document he seeks firstly to correct a typographical error in one of his prior memoranda and secondly to argue that the corporation or its shareholders could have bought out his interest in the corporation and thereby saved the cost of defending against his claims. In effect it is an additional reply brief.

Permission to file a document belatedly is within the discretion of the court. IRCP Rule 56(c). Although there does not appear to be good cause for changing the time requirements in this instance, the defendants have not been nor will they be disadvantaged by consideration of the document. The court will consider the document and allow its filing. Compare, *Sun Valley Potatoes, Inc. v. Rosholt,*

Robertson & Tucker, Chartered, 133 Idaho 1, 6, 981 P.2d 236 (1999) (suggesting that "disadvantage" to the opposing party is a legitimate concern).

ITI IS SO ORDERED.

****

DEFENDANTS' MOTION TO STRIKE.

The defendants have asked that portions of the plaintiff's various affidavits be stricken and disregarded in ruling on the motion for summary judgment.

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show that the affiant is competent to testify to the matters stated therein...." IRCP Rule 56(e). If a witness is qualified by knowledge, skill, experience, training or education, he or she may testify in the form of an opinion or otherwise on a matter involving scientific, technical , or other specialized knowledge, if the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. IRE Rule 702. Mere conclusory statements that do not provide specific, admissible facts fail to satisfy the admissibility and competency requirements of IRCP Rule 56(e). *Hecla Mining Company v. Star-Morning Mining Company,* 122 Idaho 778, 786, 839 P.2d 1192 (1992). Likewise statements that are speculative do not satisfy the requirements of admissibility and competency. *Dulaney v. St. Alphonsus Regional Medical Center*, 137 Idaho 160, 164, 45 P.3d 816 (2002). Furthermore, "The requirements of Rule 56(e) are not satisfied by an affidavit that is conclusory, based on hearsay, and not supported by personal knowledge." *State v. Shama Resources Limited Partnership,* 127 Idaho

267, 271, 899 P.2d 977 (1995).

An expert opinion or inference may be based on facts or data not admissible in evidence if the facts or data are of a type reasonably relied upon by experts in the particular field. IRE Rule 703. Even so, "An expert opinion that is speculative or unsubstantiated by facts in the record is inadmissible because it would not assist the trier of fact to understand the evidence or determine a fact that is at issue." *Swallow v. Emergency Medicine of Idaho,* 138 Idaho 589, 592, 67 P.3d 68 (2003). Expert opinion that merely suggests possibilities properly may be excluded. *Bromley v. Garey*, 132 Idaho 807, 811, 979 P.2d 1165 (1999).

The defendants seek to strike portions of the affidavits of Karen A. Ginnett and Dennis R. Reinstein, both of whom are certified public accountants hired to assist the plaintiff in this litigation. The court will consider only those parts of the affidavits of Ms. Ginnett and Mr. Reinstein that meet the requirements of IRCP Rule 56(e) and, where appropriate, the requirements of IRE Rule 702. In the body of this memorandum the court may make specific reference to portions of the affidavits that it considers to be inadmissible or otherwise of no evidentiary value in a summary judgment proceeding.

IT IS SO ORDERED.

****

SUMMARY JUDGMENT STANDARDS

Summary judgment "... shall be rendered forthwith if the pleadings,

depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." IRCP Rule 56(c). The trial court must liberally construe the facts in the existing record in favor of the non-moving party and should draw all reasonable inferences from the record in favor of the non-moving party. *Anderson v. Ethington*, 103 Idaho 658, 660, 651 P.2d 923 (1982). In this process the court must look to the totality of the motions, affidavits, depositions, pleadings, and attached exhibits, not merely to portions of the record in isolation. *Central Idaho Agency v. Turner*, 92 Idaho 306, 442 P.2d 442 (1968). Circumstantial evidence can create a genuine issue of material fact. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 361 (1969). All doubts must be resolved against the moving party. *Ashby v. Hubbard*, 100 Idaho 67, 593 P.2d 402 (1979). The motion must be denied "if the evidence is such that conflicting inferences can be drawn therefrom and if reasonable [people] might draw different conclusions." *Id.*

Controverted facts are viewed in favor of the party resisting the motion for summary judgment. When a jury has been requested, the non-moving party also is entitled to the benefit of every reasonable inference that can be drawn from the evidentiary facts. *Anderson v. Ethington*. Thus the burden of a party, when faced with a motion for summary judgment, is not to persuade the judge that an issue will be decided in its favor at trial. Rather, it "simply must present sufficient materials to show that there is a *triable* issue." 6 MOORE, TAGGART & WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 56.11(3), at p. 56-243 (2d ed. 1988).

A triable issue exists whenever reasonable minds could disagree as to the material facts or the inferences to be drawn from those facts. *Petricevich v. Salmon River Canal Co.*; *Snake River Equipment Co. v. Christensen*, 107 Idaho 541, 691 P.2d 787 (Ct. App. 1984). Therefore, although a party carries the ultimate burden at trial of proving facts to a standard of probability, the court in a summary judgment proceeding does not weigh the evidence for probability. The court determines only whether the evidence frames an issue upon which reasonable minds could disagree. Beyond this threshold of reasonableness, weighing the evidence is a task reserved to the trier of fact, who will have a first-hand opportunity to consider conflicting evidence and observe the cross-examination of witnesses. *Earl v. Cryovac, A Division of W. R. Grace*, 115 Idaho 1087, 1094, 772 P.2d 725 (Ct. App. 1989).

Nevertheless, in a case in which the non-moving party has the burden of proof at trial, summary judgment is appropriate if that party fails to make a showing of the existence of an element essential to its case, provided that an adequate time for discovery has passed. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Sparks v. St. Luke's Regional Medical Center*, 115 Idaho 505, 768 P.2d 768 (1988). A mere scintilla of evidence or only a slight doubt is insufficient to withstand summary judgment. *Corbridge v. Clark Equipment Co.*, 112 Idaho 85, 730 P.2d 85 (1986). "[T]he party opposing the motion must present more than a conclusory assertion that an issue of fact exists." *Coughlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 401, 987 P.2d 300 (1999). The non-moving party cannot rest its case upon mere speculation. *Finolt v. Cresto*, 143 Idaho 894, 897, 155 P.3d

695 (2007). Furthermore an unsworn allegation in a pleading does not create a disputed issue of fact in the face of affidavits or other materials provided for in the summary judgment rule. IRCP Rule 56(e); *Tafoya v. Fleming*, 94 Idaho 3, 479 P.2d 483 (1971). Summary judgment should be granted whenever, on the basis of the evidence before the court, a directed verdict would be warranted or whenever reasonable minds could not differ as to the facts. *Snake River Equipment Co. v. Christensen.*

Finally, when evidentiary facts are not disputed and when, as here, a judge will be the trier of fact, summary disposition may be appropriate, despite the possibility of conflicting inferences, because the judge alone will be responsible for resolving the conflict between those inferences. *Riverside v. Ritchie,* 103 Idaho 515, 519, 650 P.2d 657, 661 (1982). "When an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based on the undisputed evidence properly before it and grant summary judgment despite the possibility of conflicting inferences. *Intermountain Forest Management, Inc. v. Louisiana Pacific Corporation,* 136 Idaho 233, 235, 31 P. 3d 233 (2001).

PRIOR PROCEEDINGS, UNDISPUTED FACTS AND DISCUSSION

The procedural and factual background of this dispute is germane to the motions for summary judgment. As noted in a previous memorandum issued by this court, the background has been described at length in the Supreme Court opinion in *McCann v. McCann*:

.... Ron [Plaintiff Ronald R. McCann] and Bill McCann [Defendant William V. McCann, Jr., who is Ronald's brother] each were gifted 36.7% of the shares of the corporation [Defendant McCann Ranch and Livestock Co.] in the 1970's. The remaining stock was held by their father, William McCann, Sr. In 1997, Bill began working part time for the corporation. In that same year William, Sr. passed away and his interest in the corporation transferred to a trust [Defendant William V. McCann Sr. Stock Trust] set up to benefit his wife, Gertrude. The trustee, Meisner [Defendant Gary E. Meisner], was given the power and discretion to redeem shares of stock to provide an income for Gertrude. Following Gertrude's death, the shares were to pass to Bill.

Beginning in the latter part of 1998, the parties' attorneys began working to resolve differences between Ron and the corporation. Among the issues raised by Ron were: the use of corporate funds to pay for estate taxes, an increase in the amount of salary paid to Bill, the failure to seek repayment for a corporate loan, the payment of consulting fees when no services were rendered, the logging of timber belonging to the corporation and the improper characterization of employee payments. The corporation gave financial and property-related information, which Ron was entitled to as a shareholder, to Ron's attorney.

Following a series of letters between the attorneys, a special board of directors meeting was scheduled in August 2000 to address the many issues raised by Ron. Despite the scheduled board of directors meeting, Ron's attorney sent a letter to the corporation's attorney and directors pursuant to I.C. Section 30-1-742 on June 9, 2000, demanding immediate action be taken by the corporation on various matters [including a loan made to the estate and Gertrude instead of redeeming shares of stock, payments to Gertrude as consulting compensation, improper tax characterization of employee accounts, corporate funds paying for non-corporate work, expenditures for automobile services, corporate vehicles being used for personal use, and logging of the corporate timber property]. The corporation's attorney responded, requesting time to inquire into the allegations and prepare a response. Ten days later, however, on June 19, 2000, Ron filed his complaint. The complaint alleged both derivative and individual claims relating to the following causes of action: breach of fiduciary duties, negligence by the directors, conversion of corporate property, self-dealing and conflict of interest transactions. The defendants filed motions to dismiss for failure to comply with the requirements of I.R.C.P. 23(f) and I.C. Section 30-1-742. Gary Meisner's motion also asserted that Ron lacked standing to sue him as a trustee. On August 3, 2000, Ron filed a motion to amend his complaint.

****

The board of directors of the corporation met on August 9, 2000, and addressed a majority of Ron's claims. Another meeting of the board of directors was held on September 6, 2000, to address the remaining claims. At that meeting, Ron was

removed as a director by a majority vote of the shareholders.

McCann v. McCann, 138 Idaho at 231-232.

On January 5, 2001, Ronald McCann's motion to amend was denied and his complaint was dismissed with prejudice by the district court, because the complaint alleged derivative claims, and there had been no compliance with the requirements of I. C. Section 30-1-742. He appealed the decision. The Supreme Court affirmed but noted:

> Although the district court's determination that the dismissal would be with prejudice has not been directly challenged on appeal, we conclude that this dismissal would affect only the claims that Ron attempted to pursue in his complaint prior to the dismissal, and would not prevent him from properly asserting new, unresolved claims complying with I.C. Section 30-1-742 that may arise following the order of dismissal.

McCann v. McCann, 138 Idaho at 232, fn. 2.

In 2008 Ronald McCann instituted the current litigation. In his amended complaint, the plaintiff asserted in his first cause of action that the defendants breached fiduciary duties they owed to him. In his second cause of action he sought dissolution of the corporation or alternative equitable relief by way of a forced buyout of his shares or a reorganization of the corporation.

In dismissing the first cause of action, the court held that the claims contained in it were derivative in nature and that Ronald McCann had failed to comply with conditions precedent to bringing a derivative action.

With respect to the second cause of action, the court found that Ronald McCann had stated a claim for relief under the applicable dissolution statute. I. C.

Section 30-1-1430. The statute provided in relevant part that:

> The Idaho district court..., may dissolve a corporation:
> ****
> (2) In a proceeding by a shareholder if it is established that:
> ****
> (b) The directors or those in control of the corporation have acted or are acting in a manner that is illegal, oppressive or fraudulent, and irreparable injury to the corporation is threatened or being suffered by reason thereof;...

After finding that the plaintiff had stated a claim for dissolution in Count Two, the court noted that it likely would consider only events that took place after January 5, 2001. The court also held that the dissolution claim was personal to Ronald McCann as a shareholder and not derivative. See, e.g., Fletcher Cyc Corp, Section 5326.10 (Perm Ed); *Kalabogias v. Georgou*, 627 N.E.2d 51 (Ill. App. 1993); see also, Idaho Reporter's Comment to I.C. Section 30-1-1430(2)(b) (suggesting inferentially that a shareholder's action for dissolution under this statute is not derivative).

Neither the corporation nor any of the other shareholders has elected to purchase the shares owned by the plaintiff as a statutory alternative to dissolution. I. C. Section 30-1-1434(1).

The court has ruled that as an alternative to dissolution, the court may grant a remedy by way of an equitable forced buyout of Ronald McCann's shares or by way of a reorganization of the corporation. The court noted that numerous authorities have suggested that these forms of equitable relief are appropriate as somewhat less onerous methods of remedying corporate oppression. See, e.g., *Gillingham v. Swan Falls Land & Cattle Company*, 106 Idaho 859, 862, 683 P.2d 895 (Ct. App. 1984)

(interpreting a similar statute). Nevertheless, as a condition of obtaining any type of equitable relief Ronald McCann must prove both of the statutory requirements contained in I.C. Section 30-1-1430(2)(b).

In Idaho, unlike other jurisdictions that have adopted the model business corporation act, evidence of illegal, oppressive or fraudulent conduct by the directors is insufficient if there is no evidence that irreparable injury is threatened to the corporation or being suffered by the corporation by reason of the directors' wrongful conduct. I.C. Section 30-1-1430(2)(b). There must be proof that both elements of I.C. Section 30-1-1430(2)(b) were violated; only then is the court authorized to fashion relief, whether the relief is authorized by statute or by equitable principles. In other words, before a plaintiff is entitled to a remedy, he must prove his underlying claim for relief.

As the court initially understood the record, it believed that Ronald McCann contended that the directors of the corporation acted illegally, oppressively, or fraudulently since January 5, 2001, in the following respects:

1. They refused to declare dividends or declared dividends in an insufficient amount, considering the business and finances of the corporation;
2. They caused the corporation to pay William McCann, Jr., an unreasonably high salary and other benefits as compensation for his services as president of the corporation;
3. They caused the corporation to spend to date over $250,000.00 in defending itself and its directors in this proceeding;

4. They caused the corporation to enter into unsound and unreasonable financial transactions with Gertrude McCann, the widow of William McCann, Sr.; and the transactions may subject the corporation at some time in the future to federal and state income tax audits and liability, including principal, interest, and penalties.

During his argument in opposition to the motion for summary judgment the attorney for Ronald McCann disclaimed any contention that William McCann, Jr., received an unreasonably high salary or benefits as compensation for his services as president of the corporation. The court, therefore, will ignore any suggestion to the contrary.

For the purpose of the summary judgment proceedings only, the court will treat the other alleged acts as if they were illegal, fraudulent, or oppressive. This does not mean that court has made a determination that in fact the actions of the directors were illegal, fraudulent, oppressive, or otherwise wrongful. For example, it is clear that in many circumstances it is lawful and sometimes mandatory for a corporation to indemnify its directors against liability and expenses incurred in the course of or as a result of corporate litigation. See, I.C. Sections 30-1-850 -- 30-1-859.

A threshold issue in this summary judgment proceeding is to define "irreparable injury." In the context of a public utility rate case, the Idaho Supreme Court has defined a similar term, "irreparable damage", as "that injury which cannot be adequately compensated monetarily." *Utah Power & Light Company v. Idaho Public Utilities Commission,* 107 Idaho 47, 51, 685 P.2d 276 (1984). Black's Law

Dictionary defines irreparable injury as "[a]n injury that cannot be adequately measured or compensated by money and is therefore often considered remediable by injunction." *Black's Law Dictionary*, Eighth Edition, at 801. Case law also suggests that a threatened injury must be "real" and "imminent." See, *Miller v. Ririe Joint School District No. 252*, 132 Idaho 385, 388, 973 P.2d 156 (1999). It must be likely and not merely a possibility. Speculative injury does not constitute irreparable injury. *Caribbean Marine Services Company Inc. v. Baldridge*, 844 F.2d 668 (9th Cir. 1988). Similarly, potential exposure to civil liability has been treated as wholly speculative and not a threat of real and immediate irreparable injury when no lawsuit was currently threatened. *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F. 2d 231 (9th Cir. 1980).

The emphasis on a lack of remedy by way of monetary damages may not be totally satisfactory in every instance. "It is sometimes said, in this regard, that an injury is irreparable where there is no adequate remedy at law, as where there exists no certain pecuniary standard for measuring the damage, although it has been observed that the inadequacy of a recovery of damages is not synonymous with irreparable injury in determining grounds of equitable relief." 27A Am. Jur. 2d Equity, Section 34. Nevertheless, the definition adopted in *Utah Power & Light* is a more accurate statement of the law than the definition suggested by the plaintiff and for which he cites no authority whatsoever – "harm that cannot be repaired and which harm involves a material financial amount." *Plaintiff's Responsive Summary Judgment Memorandum*, P.2.

Another threshold issue is a determination of who must suffer irreparable injury or be threatened with irreparable injury. The applicable statute contains the answer. I.C. Section 30-1-1430(2)(b) specifically provides that *the corporation* is the entity that must be threatened with or suffering irreparable injury by the action of the directors. Whether Ronald McCann is suffering or being threatened with irreparable injury by the action of the directors is irrelevant to a determination of whether there is a valid claim for dissolution under I.C. Section 30-1-1430(2)(b). Of course, if the court reaches the conclusion that a valid claim for dissolution has been established, then the best interests of all the shareholders, including the plaintiff, may be considered in fashioning a remedy, which may or may not amount to actual dissolution. See, *Gillingham v. Swan Falls Land & Cattle Company.*

****

It is undisputed that McCann Ranch and Livestock Company is an Idaho corporation with real estate and livestock assets in the Lewiston area. When William McCann, Sr., formed the corporation in 1974, he and his wife, Gertrude McCann, transferred ranch, timber, undeveloped commercial land, and cash to the corporation. Over several years William McCann, Sr., gifted 36.7% of the shares of the corporation to each of his sons, William McCann, Jr., and Ronald McCann. Following the death of William McCann, Sr., in 1997, the remaining shares in the corporation were bequeathed in trust to Defendant Gary Meisner for the benefit of Gertrude McCann during her life, with the shares held in trust to be distributed to William McCann, Jr., upon Gertrude's death. The ownership interest in the shares has remained

unchanged since the death of William McCann, Sr.

The corporation has been managed by a board of directors that currently consists of William McCann, Jr., James A. Schoff, Defendant Gary Meisner, and Lori McCann. The corporation has a compensation committee and a dividend committee, each of which consists of Mr. Schoff and Mr. Meisner.

Between 2002 and 2008, the corporation has had annual *net* income as follows:

2002	$ 69,764.60
2003	$129,160.13
2004	$ 23,180.69
2005	$ 106,309.54
2006	$ 309,067.25
2007	$ 75,865.77
2008	$ 138,139.62
TOTAL	$851,487.60

The corporation is profitable and financially sound, but it is experiencing reduced cash flow as a result of:

1. Litigation expense to date of $250,000.00 incurred in defending itself and the defendant directors in the captioned case;

2. Loss of income from the closure of one of its larger tenants, Tidymans;

3. Amortization of a $6,100,000.00 loan from Protective Life Insurance Company at the rate of $58,741.00 per month.

The Protective Life loan was obtained in 2004 at a fixed interest rate of 5.75%. It was used to refinance several existing loans with higher interest rates. As of

December 1, 2009, the remaining balance was $3,935,646.00, which will be paid off at the current rate in 6 ½ years.

The corporation has paid dividends since 2001 as follows:

12/28/2004	$10,000.00 at $.04 per share
1/17/2007	$25,000.00 at $.10 per share
3/31/2008	$35,000.00 at $.14 per share

Ronald McCann has asserted in the course of the litigation that the corporation is worth $20,000,000.00. For the purpose of the summary judgment motion, the defendants have not disputed that figure.

From 2001 until the end of 2006, the corporation paid William McCann, Jr., an annual salary of $144,000.00 for his work as corporate president. Beginning in 2007, his annual salary was increased to $160,000.00. He also receives the use of a corporate vehicle and a mobile phone. He receives no other compensation or benefits. He devotes approximately 80% of his work time to corporate duties and 20% of his time to a private law practice.

The financial transactions between the corporation and Gertrude McCann are confusing. Although the court indicated that it will consider only events occurring after the dismissal of the first case on January 5, 2001, it is necessary to look at the entire history of the financial transactions between the corporation and Mr. and Mrs. McCann, Sr., in order to gain some understanding of what has occurred since January 2001.

Throughout the corporation's existence, it paid many of the personal expenses

of William McCann, Sr., and Gertrude McCann, which have been accounted for as "receivables", since an IRS audit in 1986 and 1987. There has been no state or federal audit of the corporation since that time; nor has the corporation been notified by any taxing authority that an audit may take place at some time in the future.

When William McCann, Sr., died in 1997, the balance of the receivable account was $81,360.29. At that time the corporation created another receivable account for Gertrude McCann's personal expenses. It is undisputed that the corporation has paid and continues to pay many of Gertrude McCann's personal expenses, including utilities, fuel, telephone, and auto repairs. These have been posted to the receivable account.

In 1988 the corporation constructed a 40' x 100' shop on ground owned by the senior McCanns but paid no rent for the use of the land. The corporation eventually decided that a fair amount to recognize as unpaid rent from and after March 1, 1988, was $106,000.00. It executed and delivered to Gertrude McCann its promissory note in that amount.

In 2006 Gertrude McCann executed and delivered to the corporation a promissory note for $165,341.00, apparently for accrued personal expenses paid by the corporation. When asked at her deposition about the indebtedness, Mrs. McCann stated that she owed nothing to the corporation.

Gertrude McCann lives in the former family home located on a thirty-five acre tract. In December 2000 the corporation purchased the house and acreage from Mrs. McCann, subject to her retained life estate. Since January 2001, the corporation has

paid Mrs. McCann for time and expenses incurred in maintaining and repairing the property, currently at a rate of $1,000.00 per month. In addition the corporation continues to pay for the assistance of a handyman who works on the property.

There is no competent, admissible evidence in the record about Gertrude McCann's financial situation other than the facts that she owns 100 acres of land near Craigmont, that she is the current beneficiary of the McCann trust and the residential life estate, and that she receives payments from the corporation.

Dorothy Snowball, a certified public accountant, has served as the corporate accountant since 1988. She prepares its state and federal income tax returns, reviews its general ledger, provides journal entries for preparation of its financial reports, and provides general accounting and tax advice. She works as an independent contractor and not as a corporate employee.

****

The plaintiff's opposition to the summary judgment motion centers primarily on the corporation's past and current financial dealings with Gertrude McCann. The plaintiff contends the directors' allegedly illegal, fraudulent, or oppressive conduct has caused or threatens to cause irreparable injury to the corporation for two reasons:

1. If, as conceded for the purpose of the summary judgment motion only, the financial dealings are illegal, fraudulent, or oppressive, Mrs. McCann will be unable to reimburse the corporation;
2. If, as conceded for the purpose of the summary judgment motion only, the financial dealings are illegal, fraudulent or oppressive, they could trigger a

state or federal tax audit that in turn could result in liability for back taxes, interest, and penalties.

With respect to the ability or inability of Ms. McCann to repay the corporation, there is authority for the proposition that the established inability of a debtor to satisfy a debt or judgment may constitute irreparable harm, even though the availability of a claim for monetary damages as a remedy ordinarily forecloses a finding of irreparable injury. See, e.g., *Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186 (3d Cir. 1990); *Alvenus Shipping Co., Ltd. V. Delta Petroleum (U.S.A.) Ltd,* 876 F. Supp. 482 (S.D.N.Y. 1994).

The plaintiff's argument that Mrs. McCann will be unable to repay the corporation is based not upon concrete evidence in the record but upon mere conjecture about her financial condition. The burden is on the plaintiff at the summary judgment stage to present some evidence from which the court can infer the existence of the elements of his claim, that is, (1) wrongful conduct by the directors and (2) irreparable injury -- in this instance through Mrs. McCann's inability to repay the corporation. The burden is not on the defendants at the summary judgment stage to present evidence negating the existence of a required element of the plaintiff's case. See, *Celotex Corp. v. Catrett.* As the Idaho Supreme Court has noted: "If a party resists summary judgment, it is his responsibility to place in the record before the trial court the existence of controverted material facts which require resolution by trial." *Berg v. Fairman,* 107 Idaho 441, 444, 690 P.2d 896 (1984). Likewise the United States Supreme Court has held: "In our view, the plain language

of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. at 322.

The only *competent and admissible* evidence of Mrs. McCann's financial condition that the plaintiff can point to in the record are the facts noted previously -- that she owns 100 acres of land near Craigmont, that she is the current beneficiary of the McCann trust and the residential life estate, and that she receives payments from the corporation. To infer from this evidence that she may not be able to pay a debt or judgment in favor of the corporation is the grossest type of speculation and conjecture. In stark contrast is the evidence in the *Alvenus* case, which demonstrated to the court that the defendant corporation had no assets, no cash, no employees, no office, and did practically no business.

The plaintiff has failed to present any competent and admissible evidence from which the fact finder, in this case the court, may infer an inability of Mrs. McCann to repay money or benefits allegedly wrongfully paid to her by the corporation.

As an alternative theory the plaintiff postulates that the payments to Mrs. McCann may at some time in the future trigger a state or federal tax audit of the corporation, which in turn may result in liability for back taxes, interest, and penalties. According to the plaintiff this possibility establishes evidence of the threat of irreparable injury to the corporation.

As of the date of this hearing, no such audit has taken place and no such audit

has been threatened by any taxing authority. Compare, *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*.

In order to accept the argument advanced by Ronald McCann the trier of fact will have to accept all of the following propositions, none of which is supported by any competent and admissible evidence in the record, but only by speculation and conjecture, albeit speculation and conjecture coming from the certified public accountants hired by the plaintiff:

1. A taxing authority at some time in the future will decide to conduct an audit of the corporation because of the way the corporation treated its financial transactions with Mrs. McCann for income tax purposes:
2. The taxing authority conducting the audit will conclude that the corporation in fact owes back taxes, penalties, or interest because of the way the corporation treated its financial transactions with Mrs. McCann for income tax purposes;
3. The amount of any back taxes, penalties, and interest assessed will be so great as to cause irreparable injury to the corporation.

The threat that all of these things actually will occur is not real and imminent. It is at best speculative and is patently insufficient to amount to evidence of actual or threatened irreparable injury.

Turning to Ronald McCann's other arguments, the failure to pay dividends in some years and the amount of dividends paid in other years cannot conceivably be interpreted as causing or threatening irreparable injury to the corporation.

Ronald McCann no longer asserts that the salary and benefits paid to his brother as president of the corporation are excessive. In any event there is not a scintilla of evidence that the salary and benefits, whether excessive or not, have caused or threaten to cause irreparable injury to the corporation.

Finally the plaintiff argues that the directors' action in having the corporation pay $250,000.00 in current litigation expenses and in having the corporation pay undetermined future litigation expenses somehow is fraudulent, illegal, or oppressive. Accepting for the moment this novel contention, there is no competent evidence, considering the undisputed current financial condition of the corporation, from which an inference may be made that current and future litigation expenses have caused or actually threaten to cause irreparable injury to the corporation.

****

A principle purpose of Rule 56 is to isolate and dispose of factually unsupported claims. The defendants in this case are entitled to a judgment as a matter of law, because the plaintiff has failed to make a sufficient showing of any competent and admissible evidence on an essential element of his claim for dissolution of the corporation, an element with respect to which he has the burden of proof. See, *Celotex Corp. v. Catrett*, at 323, 324.

Since there are no additional pending claims in this case, final summary judgment will issue dismissing the plaintiff's amended complaint in its entirety.

IT IS SO ORDERED.

ORDER

It hereby is ordered as follows:

1. The plaintiff's motion to file an additional document is granted.
2. The defendants' motion to strike is granted to the extent noted in the foregoing memorandum.
3. The defendants' motion for summary judgment is granted

Dated March 5, 2010

George D. Carey, Senior District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing MEMORANDUM AND ORDER CONCERNING VARIOUS MOTIONS was:

✓ FAXED by the undersigned at Lewiston, Idaho, this 5 day of March 2010, to:

Michael McNichols 208-746-0753
Merlyn Clark 208-954-5278
Chas. McDevitt 208-336-6912
Timothy Esser 509-334-2205

✓ MAILED by the undersigned at Lewiston, Idaho, this 5 day of March 2010, to:

Andrew Schwam
514 S Polk St #6
Moscow, ID 83843

PATTY O. WEEKS, CLERK

By: _____
Deputy

961

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN, PLAINTIFF, V. WILLIAM V. McCANN, JR., AND GARY E. MEISNER, INDIVIDUALLY AND AS DIRECTOR OF McCANN RANCH & LIVESTOCK COMPANY, INC., AND AS A SHAREHOLDER OF McCANN RANCH & LIVESTOCK COMPANY, INC., IN HIS CAPACITY AS TRUSTEE OF THE WILLIAM V. McCANN SR. TRUST, DEFENDANTS, McCANN RANCH & LIVESTOCK COMPANY, INC., NOMINAL DEFENDANT.	CASE NO. CV 08-01226C JUDGMENT filed in Chambers March 5, 2010 3:10 p.m. Sr. Dist. Judge

Based on the court's orders, it hereby is ordered, adjudged and decreed as follows:

1. The amended complaint of Plaintiff Ronald R. McCann is dismissed with prejudice, the plaintiff to obtain no relief thereby.

2. Upon timely submission of a cost bill the defendants will be entitled to

recover costs from the plaintiff, to the extent permitted by statute, rule, or contract.

Dated March 5, 2010

George D. Carey, Senior District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing JUDGMENT was:

__1/__ FAXED by the undersigned at Lewiston, Idaho, this __5__ day of March 2010, to:

Michael McNichols 208-746-0753
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__1/__ MAILED by the undersigned at Lewiston, Idaho, this __5__ day of March 2010, to:

Andrew Schwam
514 S Polk St #6
Moscow, ID 83843

PATTY O. WEEKS, CLERK

By: _____
Deputy

964

Timothy Esser #6770
Esser & Sandberg, PLLC
520 East Main Street
Pullman, Washington 99163
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514 South Polk #6
Moscow, ID 83843
Phone: (208) 882-4190

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,

Plaintiff/Appellant,

v.

WILLIAM V. McCANN, JR., and GARY E. MEISNER, individually as a director of McCann Ranch Livestock Company, Inc., and as a shareholder of McCann Ranch & Livestock, Inc., in his capacity as Trustee of the William V. McCann, Sr. Stock Trust,

Defendants/Respondents,

McCANN RANCH & LIVESTOCK COMPANY, INC.,

Nominal Defendant/Nominal Respondent.

No. CV08-01226

NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENTS, WILLIAM V. MCCANN, JR., GARY E. MEISNER AND MCCANN RANCH & LIVESTOCK COMPANY, INC. AND THEIR ATTORNEYS, MERLYN CLARK, CHARLES MCDEVITT AND MICHAEL MCNICHOLS

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AND TO: THE CLERK OF THE ABOVE-ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant, Ronald R. McCann, appeals against the above-named Respondent(s) to the Idaho Supreme Court from the:

1) Memorandum and Order, and Partial Summary Judgment, both filed March 4, 2009, and entered in this action by the Honorable George D. Carey, Sr. District Judge;

2) The Second Memorandum and Order Concerning Discovery filed August 31, 2009, and entered herein by The Honorable George D. Carey, Sr. District Judge.

3) The Memorandum and Order Concerning Various Motions, and the Judgment, both filed herein March 5, 2010, entered by The Honorable George D. Carey, Sr. District Judge.

2. That the party has a right to appeal to the Idaho Supreme Court the judgments or orders described in paragraph 1 above because the Memorandum and Order Concerning Various Motions and the Judgment, filed March 5, 2010, are final judgments as interpreted by Rule 11(a)(1), I.A.R. which in turn, makes the Memorandum and Order and Partial Summary Judgment filed March 4, 2009, and the Second Memorandum and Order Concerning Discovery filed August 31, 2009, final orders. And therefore, Appellant appeals as a matter of right.

3. The primary issue on appeal is:

1) The question of whether a minority shareholder of a closely held Idaho for profit corporation, who is the subject of a squeeze out, perpetrated by those in control of the corporation, may bring an individual, direct action for relief, as opposed to a derivative action for the benefit of the corporation and: 1) did the Court err in dismissing Count I of the Amended Complaint; 2) if the shareholder was oppressed by a squeeze out, can he bring an individual direct action for relief, and can the Court grant as the remedy a forced redemption of his shares for fair market value and/or order a corporate dissolution? Other issues include:

2) What is the appropriate definition of oppression in circumstances involving a minority shareholder's interest in a closely held Idaho for profit corporation and, does the concept of oppression in these circumstances include frustration of the complaining shareholder's reasonable expectation?

3) Are facts which were known, or with the exercise of reasonable diligence could have been known, and litigated during an earlier derivative action, which action was dismissed for failure to follow proper procedure, admissible in a later individual, direct action, brought by a minority shareholder of a closely held Idaho for profit

corporation, and involving the same corporation and party defendants and, if not admissible as substantive evidence, nevertheless, admissible to prove the significance/meaning of later actions taken by those in control of the corporation.

4) And whether these earlier actions are admissible in a subsequent action either substantively or to explain subsequent behavior, should the plaintiff be precluded from engaging in discovery of circumstances which occurred before the dismissal of the earlier action?

5) What is the appropriate definition/analysis of the term "threat of irreparable harm" as set forth in I.C. 30-1-1430?

6) Can a court grant relief to a plaintiff shareholder in a dissolution action brought pursuant to I.C. 30-1-1430 other than ordering dissolution of the corporation, for example, can the court order the corporation to redeem the plaintiff's shares for their fair market value?

4. No order has been entered sealing any portion of the record.

5. Because a trial never occurred, no reporter's transcript is requested.

6. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.

DOCUMENT NAME	DATE FILED
• Complaint for Equitable Relief and Damages	6/10/2008
• Motion to Dismiss (filed on behalf of Def Gary Meisner)	7/14/2008
• Memorandum in Support of Motion to Dismiss	7/16/2008
• Plaintiff's Responsive Memorandum to Defendants' Motion to Dismiss	9/17/2008
• Amended Complaint for Equitable Relief and Damages	10/15/2008
• Motion to Dismiss Amended Complaint for Equitable Relief and Damages (filed by Def William McCann)	10/24/2008
• Motion to Dismiss (filed by Def Gary Meisner)	10/24/2008
• Motion to Dismiss Amended Complaint for Equitable Relief and Damages (filed by Def McCann Ranch)	10/24/1008
• Reply Memorandum in Support of Motion to Dismiss	1/5/2009
• Plaintiff's Response to Defendant's Reply Memorandum	1/15/2009

• Memorandum and Order (filed in Chambers 3/4/09 by Judge Carey)	_____
• Court's Partial Summary Judgment (filed in Chambers 3/4/09 by Judge Carey)	3/9/2009
• Plaintiff's Motion for Reconsideration	4/20/2009
• Plaintiff's Memorandum in Support of His Motion for Reconsideration	5/7/2009
• Nominal Defendant's Memorandum in Opposition to Plaintiff's Motion for Reconsideration	5/8/2009
• Nominal Defendant McCann Ranch & Livestock Company Inc.'s Answer to Plaintiff's Amended Complaint for Equitable Relief and Damages	5/8/2009
• Defendant Gary Meisner's Answer to Plaintiff's Amended Complaint for Equitable Relief and Damages	5/11/2009
• Defendant McCann's Answer to Plaintiff's Amended Complaint for Equitable Relief and Damages	5/15/2009
• Memorandum and Order on Various Motions	8/6/20096
• Plaintiff's: 1) Motion to Compel Discovery; 2) Declaration; 3) Supporting Memorandum	8/14/2009
• Affidavit of Timothy Esser	8/17/2009
• Motion for Protective Order (Def William McCann)	8/17/2009
• Memorandum in Support of Motion for Protective Order and in Opposition to Plaintiff's Motion to Compel	8/19/2009
• Supplemental Affidavit of Timothy Esser	8/19/2009
• Plaintiff's Responsive Discovery Memorandum	8/19/2009
• Motion for Protective Order (filed by Def Gary Meisner)	8/31/2009
• Second Memorandum and Order Concerning Discovery	1/15/2010
• McCann Ranch Motion for Summary Judgment	1/15/2010
• Memorandum in Support of McCann Ranch Motion for Summary Judgment	1/15/2010
• Affidavit of William McCann in Support of Def McCann Ranch Motion for Summary Judgment	1/15/2010
• Affidavit of Gary Meisner	1/15/2010

• Affidavit of James Schoff in Support of Motion for Summary Judgment	1/15/2010
• Affidavit of Dorothy Snowball in Support of Motion for Summary Judgment	1/20/2010
• Def Gary Meisner's Joinder in McCann Ranch Motion for Summary Judgment	1/19/2010
• Def William McCann's Motion for Summary Judgment	2/12/2010
• Plaintiff's Responsive Summary Judgment Memorandum	2/12/2010
• Affidavit of Dennis Reinstein CPA	2/12/2010
• Affidavit of Karen Ginnett CPA	2/12/2010
• Affidavit of Ronald McCann	2/17/2010
• Motion (McCann Ranch) to Strike and Disregard Testimony from Affidavits of Karen Ginnett and Dennis Reinstein and the Related Argument Contained in Plaintiff's Responsive Summary Judgment Memorandum	2/17/2010
• Memorandum in Support of Motion (McCann Ranch) to Strike and Disregard Testimony from Affidavits of Karen Ginnett and Dennis Reinstein and the Related Argument Contained in Plaintiff's Responsive Summary Judgment Memorandum	2/18/2010
• Reply Memorandum of McCann Ranch's Motion for Summary Judgment and Affidavit of Counsel in Support of McCann Ranch's Motion for Summary Judgment	2/24/2010
• Plaintiff's Correction / Supplemental Authority	2/25/2010
• Plaintiff's Response to Defendant McCann Ranch & Livestock's Motion to Strike	3/5/2010
• Memorandum and Order Concerning Various Motions	3/5/2010
• Judgment	

7. I certify:

That the estimated fee for preparation of the clerk's or agency's record has been paid.

That the appellate filing fee has been paid.

That service has been made upon all parties required to be served pursuant to Rule.

DATED THIS 17 day of March 2010.

Timothy Esser
Esser & Sandberg, PLLC
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 17 day of March 2010, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Merlyn W. Clark
Hawley, Troxell, Ennis & Hawley
P.O. Box 1617
Boise, ID 83701-1617
Attorneys for Defendant William McCann

XX U.S. Mail, Postage Prepaid
XX Email– mclark@hawleytroxell.com
____ Telecopy

Charles F. McDevitt and Dean Miller
McDevitt & Miller, LLP
P.O. Box 2564
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Attorneys for Defendant McCann

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Clements, Brown McNichols, P.A.
P.O. Box 1510
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Attorneys for Defendant Gary Meisner

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Timothy Esser

Chas. F. McDevitt (ISB No. 835)
Dean J. Miller (ISB No. 1968)
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Fax: 208-336-6912

Attorneys for Nominal Defendant
McCann Ranch & Livestock Company, Inc.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN, Plaintiff, vs. WILLIAM V. McCANN, JR., and GARY E. MEISNER, Defendants. McCANN RANCH & LIVESTOCK COMPANY, INC., Nominal Defendant.	Case No. CV 08-01226 DEFENDANTS' JOINT MEMORANDUM OF COSTS AND ATTORNEY FEES

The above-named Defendants, by and through their respective counsel of record, and pursuant to Rule 54(d) of the Idaho Rules of Civil Procedure, jointly submit this Memorandum of Costs and Attorneys' Fees setting forth the costs and attorney fees incurred by the Defendants in the defense of this case as follows:

COSTS AS A MATTER OF RIGHT PURSUANT TO RULE 54(d)(1)(C)

Costs Incurred by McCann Ranch and Livestock Company, Inc. ("McCann Ranch"):

Clerk of the District Court filing fee	$ 58.00
Dorothy Snowball Expert Witness Fee	$ 2,000
Ronald McCann Deposition Transcript	$ 739.20
Gary Meisner Deposition Transcript	$ 313.15
Dorothy Snowball Deposition Transcript	$ 78.39
William V. McCann, Jr. Deposition Transcript	$ 1,017.18
Lori McCann Deposition Transcript	$ 225.57

Costs Incurred by Defendant William V. McCann, Jr.:

Clerk of the District Court filing fee	$ 58.00
Gertrude McCann Deposition Transcript	$ 179.69

Costs Incurred by Defendant Gary E. Meisner:

Clerk of the District Court filing fee	$ 58.00

Total Costs As A Matter Of Right:	$ 4,727.18

DISCRETIONARY COSTS PURSUANT TO RULE 54(d)(1)(D)

Discretionary Costs Incurred by Defendant McCann Ranch:

Postage charges:	$ 104.31
Copy charges:	$ 297.16
FedEx charges:	$ 419.30
Research charges:	$ 482.60
Dorothy Snowball Expert Witness Fee (amount in excess of $2,000)	$ 1,541.04

Discretionary Costs Incurred by Defendant William V. McCann, Jr.:

Copy charges:	$ 1,943.34
FedEx charges:	$ 63.34
Westlaw charges:	$ 3,001.16
Hearing Transcript re: Motion for Reconsideration	$ 221.00

Discretionary Costs Incurred by Defendant Gary E. Meisner:

Copy charges:	$ 121.30
Long distance telephone charges:	$ 9.50
Postage charges:	$ 66.11
Facsimile charges:	$ 3.50
West Payment Center Research charges:	$ 478.52
Presnell Gage PLLC witness fees:	$ 912.00
Transcript of Hearing re Motion to Stay Discovery and Motion to Dismiss Amended Complaint 12/30/08	$ 263.25
Total Discretionary Costs:	$ 9,927.43

ATTORNEY FEES

Defendants respectfully ask the Court to award the following as reasonable attorney fees incurred, pursuant to Idaho Code §§ 12-120(3); 12-121 and/or 30-1-746, in favor of Defendants.

Attorney fees incurred by McCann Ranch:	$ 22,837.50
Attorney fees incurred by William V. McCann, Jr.:	$ 266,596.75
Attorney fees incurred by Gary E. Meisner:	$ 50,606.00
Total attorney fees incurred:	$ 340,040.25

To the best of the undersigned counsel's knowledge and belief, the items of costs, disbursements and attorney fees set forth above are correct, have been necessarily incurred in defending against Plaintiff's claims, and are in compliance with Rule 54 of the Idaho Rules of Civil Procedure and Idaho Code §§ 30—1-746, 12-120 and 12-121.

This request for costs and attorney fees is supported by the Affidavits of Chas. F. McDevitt, Merlyn W. Clark and Michael E. McNichols, filed concurrently herewith, stating the basis and method of computation of the attorney fees claim.

DATED THIS 18th day of March, 2010.

McDEVITT & MILLER LLP

By _____
Charles F. McDevitt, ISB No. 835
Attorneys for Nominal Defendant McCann Ranch & Livestock Co.

DATED THIS 18 day of March, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By _____
Merlyn W. Clark, ISB No. 1026
D. John Ashby, ISB No. 7228
Attorneys for Defendant
William V. McCann, Jr.

DATED THIS 18th day of March, 2010.

CLEMENTS BROWN

By _____
Michael E. McNichols
Attorneys for Defendant Gary Meisner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of March, 2010, I caused to be served a true copy of the foregoing DEFENDANTS' JOINT MEMORANDUM OF COSTS AND ATTORNEYS' FEES by the method indicated below, and addressed to each of the following:

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McCann Ranch & Livestock Company, Inc.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN, Plaintiff, vs. WILLIAM V. McCANN, JR., and GARY E. MEISNER, Defendants. McCANN RANCH & LIVESTOCK COMPANY, INC., Nominal Defendant.	Case No. CV 08-01226 DEFENDANTS' JOINT MEMORANDUM IN SUPPORT OF REQUEST FOR COSTS AND ATTORNEY FEES

The above named Defendants, by and through their respective counsel, submit the following memorandum in support of their request for costs and attorney fees.

I. PROCEDURAL BACKGROUND

The present dispute between Plaintiff Ronald R. McCann and the Defendants began over nine years ago and is now in its second round through the courts. Plaintiff is a shareholder of the McCann Ranch and Livestock Company, Inc. (the "Corporation"). On June 19, 2000, Plaintiff filed an action in Nez Perce County District Court, Case No. CV-00-01111 (*McCann I*), naming as defendants two shareholders of the Corporation, William V. McCann, Jr. and Gary E. Meisner (the "Director Defendants"). Plaintiff's 2000 lawsuit alleged a variety of causes of action against the Director Defendants, including breach of fiduciary duties, negligence, conversion, self-dealing and conflict of interest transactions. *See* Complaint filed in *McCann I* (the "*McCann I* Complaint"), ¶¶ 4.1 - 8.7, attached as Exhibit 1 to Defendants' Memorandum in Support of Motion to Dismiss previously filed in the current action.

The Director Defendants moved to dismiss the *McCann I* Complaint for failure to follow the written demand requirement for bringing a derivative action against the directors of a corporation. *See* I.C. § 30-1-742 ("No shareholder may commence a derivative action until . . . ninety (90) days have expired from the date the [written] demand was made [upon the corporation to take suitable action]"). The District Court concluded that the causes of action were derivative claims subject to the written demand requirement set forth in I.C. § 30-1-742. *See* Opinion and Order Re: Pending Motions (the "*McCann I* District Court Opinion", attached as Exhibit 4 to Defendants' Memorandum in Support of Motion to Dismiss previously filed in the current action) at p. 4. In *McCann I*, the District Court stayed the action for ninety (90) days to allow Plaintiff to comply with the written demand requirement and ordered that "issues raised in the complaint which are not resolved by the Board of Directors under I.C. § 30-1-742(2), can be raised after the expiration of the 90-day period." *Id.* (emphasis added).

Plaintiff failed to comply with that order from the District Court. Plaintiff made a written demand on the Corporation, but then filed an Amended Complaint just ten (10) days after the written demand. The Amended Complaint asserted the same causes of action as the original Complaint and included a variety of allegations against William McCann, Jr. and Gary Meisner, including: (1) that the Board was paying Gertrude McCann (the mother of Ronald McCann and William V. McCann, Jr.) an annual consultation fee; (2) that the Board had increased William V. McCann Jr.'s salary in 1999 to $144,000 per year; and (3) that Ronald McCann was removed as a director of the Corporation. *See id.*; *see also McCann I* District Court Opinion, pp. 2-5.

The Director Defendants again moved to dismiss the *McCann I* Complaint on grounds that Plaintiff had failed to comply with the demand requirements of I.C. § 30-1-742. Plaintiff opposed the motion to dismiss on grounds that his claims were not derivative, but instead were direct actions that did not require written notice to the Corporation. The District Court granted the motion to dismiss with prejudice, concluding that the causes of action were derivative and that Plaintiff had failed to comply with the written demand requirements for a derivative action. *See McCann I* District Court Opinion, p. 8 ("The defendants are also correct that the plaintiff, in both complaints, is attempting to assert individual claims which are actually derivative claims on behalf of the Corporation.").

In dismissing the *McCann I* Complaint, the District Court concluded that Plaintiff should not be permitted to amend his complaint in light of his refusal to follow the statutory written demand requirements:

> [B]ecause Plaintiff's counsel failed to follow the dictates of I.C. § 30-1-742 for a second time, this Court is forced to use its discretionary authority to dismiss this action with prejudice. Otherwise, the purpose behind Section 30-1-742 et seq. will be thwarted, and the shareholders will never be forced to cooperate with each other in the corporate context as anticipated by the

> statute. This Court believes it is only encouraging controversy by allowing this action to proceed, at the cost of the corporation's and the individual parties' pocketbooks.

Id. at p. 8.

The Director Defendants then moved for attorney fees pursuant to I.C. § 30-1-746, which allows for attorney fees in a derivative action where the court finds "that the proceeding was commenced or maintained without reasonable cause or for an improper motive." The District Court granted the motion for attorney fees based on Plaintiff's failure to follow the dictates of I.C. § 30-1-742. *See McCann I* District Court Opinion, p. 10.

The Idaho Supreme Court affirmed the District Court's conclusion that the causes of action against the Director Defendants, including the cause of action for breach of fiduciary duties, are derivative in nature and may be pursued only after serving a derivative demand. *See McCann v. McCann*, 138 Idaho 228, 61 P.3d 585 (2002) ("*McCann I*"). The Idaho Supreme Court also affirmed the award of attorney fees and awarded fees on appeal based on Plaintiff's failure to comply with the written demand requirements set forth in I.C. § 30-1-742. *Id.*

Six years later, Plaintiff again brought suit against the Corporation and William V. McCann, Jr. and Gary Meisner as directors of the Corporation ("*McCann II*"). Despite the fact that the Idaho Supreme Court expressly held that his earlier lawsuit for breach of fiduciary duties was derivative in nature, Plaintiff once again brought a claim for breach of fiduciary duties against the Director Defendants without complying with the written demand requirement set forth in I.C. § 30-1-742. The allegations in *McCann II* are virtually identical to the allegations in *McCann I*, except that Plaintiff also alleged transactions occurring after 2001 that are similar in nature to the pre-2001 allegations asserted in *McCann I*.

Just as he did in *McCann I*, Plaintiff incredulously asserted that his cause of action for breach of fiduciary duties was an individual cause of action, not a derivative cause of action. *See* Complaint, ¶¶ 28-29. Not surprisingly, this Court held that Plaintiff's breach of fiduciary duty cause of action is derivative and dismissed that cause of action because Plaintiff failed to comply with the derivative demand requirement in Idaho Code § 30-1-742. *See* March 4, 2009 Order.

While the Court did not dismiss Plaintiff's cause of action for dissolution of the Corporation, the Court's Order put Plaintiff on notice of the burden of proof plaintiff would face to survive summary judgment:

> The court is unwilling to dismiss the second cause of action under a Rule 12(b)(6) analysis or under a summary judgment analysis. It is well aware, however, that the proved circumstances will have to be quite significant before any of the equitable relief sought by Ronald McCann may be granted. It is also aware that the plaintiff will have to prove *irreparable* rather [than] reparable injury to the corporation.

Id. at p. 11 (emphasis in original).

Unsatisfied with the Court's decision, Plaintiff filed a motion for reconsideration, again arguing that his breach of fiduciary duty cause of action is not derivative. *See* Plaintiff's Memorandum in Support of Motion for Reconsideration, filed April 19, 2009. The Court denied Plaintiff's motion for reconsideration.

After serving a derivative demand on the Corporation, Plaintiff then filed a Motion to Amend Amended Complaint seeking to add a derivative cause of action arising out of the same allegations that served that basis for his previously dismissed breach of fiduciary duty cause of action. In his motion to amend, Plaintiff again asked the Court to reconsider its ruling that Plaintiff's breach of fiduciary duties cause of action is derivative in nature. In a November 12, 2009 Order, the Court denied Plaintiff's motion, holding that "Plaintiff's attempt to revive his

derivative action by belatedly making a demand on the board is nothing more than a somewhat revised version of his tactic, attempted in the first *McCann* case, of bringing a derivative action without bothering to comply with Idaho Code § 30-1-742." *Id.* at p. 3. The Court also denied, again, Plaintiff's request for reconsideration of its prior ruling that Plaintiff's breach of fiduciary duty cause of action was derivative in nature. *Id.* ("In one of his memoranda the plaintiff has asked the court a second time to reconsider its original summary judgment decision. . . . The court is not inclined to re-hash what it has ruled on twice.").

During this same time, the parties conducted discovery in light of the Court's Rule 16(b) scheduling order that required that discovery be completed by November 20, 2009. Given that Plaintiff continued to assert his derivative causes of action, and given that Plaintiff's judicial dissolution cause of action was based on the same factual allegations as his derivative cause of action, the discovery related to both causes of action. The discovery sought by Plaintiff was voluminous and included several requests for information related to pre-2001 transactions that were the subject of *McCann I.* Plaintiff insisted on conducting extensive pre-2001 discovery, necessitating intervention of the Court on two occasions. *See* March 5, 2009 Memorandum and Order Concerning Discovery (holding, in response to Plaintiff's motion to compel, that Defendants' discovery responses "may be limited to financial transactions since January 5, 2001); *see also* August 31, 2009 Second Memorandum and Order Concerning Discovery.

After completing discovery, Defendants moved for summary judgment on Plaintiff's judicial dissolution cause of action. As foreshadowed by the Court's March 4, 2009 Order, the motion for summary judgment focused on the element required in Idaho Code § 30-1-1430 that Plaintiff establish that "irreparable injury to the corporation is threatened or being suffered" by reason of illegal, fraudulent or oppressive conduct. The Court entered summary judgment in

favor of Defendants, concluding that Plaintiff failed to present any admissible evidence that irreparable injury to the Corporation is threatened or being suffered as a result of any conduct on the part of defendants. A final judgment having been entered by the Court, the Defendants now request an award of costs and attorney fees.

II. ARGUMENT

A. Defendants Are Entitled To Attorney Fees Pursuant to Idaho Code Section 30-1-746 Because Plaintiff's Derivative Cause Of Action Was Commenced And Maintained Without Reasonable Cause

Idaho Code § 30-1-746 provides, in relevant part:

> On termination of the derivative proceeding the court may:
>
> 2. Order the plaintiff to pay any defendant's reasonable expenses, including counsel fees, incurred in defending the proceeding if it finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose; or
>
> 3. Order a party to pay an opposing party's reasonable expenses, including counsel fees, incurred because of the filing of a pleading, motion or other paper, if it finds that the pleading, motion or other paper was not well grounded in fact, after reasonable inquiry, or warranted by existing law . . . and was interposed for an improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

I.C. § 30-1-746 (2) and (3).

In *McCann I*, the District Court entered an award of attorney fees under this statute, concluding that Plaintiff's cause of action was without reasonable cause because Plaintiff failed to comply with the derivative demand requirement set forth in Idaho Code § 30-1-742. *See* Opinion and Order Re: Pending Motions, p. 10 (attached as Exhibit 4 to Defendants' Memorandum in Support of Motion to Dismiss previously filed in the current action) ("The Court finds that this action was commenced without reasonable cause in light of the clear dictates of I.C. § 30-1-742"). The Idaho Supreme Court affirmed that award of attorney fees.

The "without reasonable cause" standard is even more clearly satisfied here than it was in *McCann I*. Plaintiff not only failed to comply with the derivative demand requirement in violation of the "clear dictates of I.C. §30-1-742," but he did so after already having been told once by the Idaho Supreme Court that his cause of action for breach of fiduciary duties is derivative in nature. *See McCann I*, 138 Idaho 228 (2002).

Moreover, Idaho law authorizes an award of attorney fees where a derivative cause of action is "commenced or maintained without reasonable cause or for an improper purpose." Idaho Code § 30-1-746 (emphasis added). Here Plaintiff repeatedly attempted to maintain his derivative cause of action even after the Court's March 4, 2009 Order of dismissal. Plaintiff pursued (1) a motion for reconsideration; (2) a motion to amend complaint; and (3) what the Court characterized as a "renewed motion for reconsideration" asking the Court to "re-hash what it has ruled on twice." *See* November 12, 2009 Order. These motions kept Plaintiff's derivative claims alive without reasonable cause until November 12, 2009 and caused Plaintiff to incur additional attorney fees.

B. An Award Of Attorney Fees Is Appropriate Under Idaho Code § 12-120(3)

Idaho Code § 12-120(3) provides for a mandatory award of attorney fees to a prevailing party in an action involving a commercial transaction:

> In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

Id.

As explained in *Nelson v. Anderson Lumber Co.*, under Idaho Code § 12-120(3), "a party may be awarded attorney fees in any civil action where a commercial transaction is involved." 140 Idaho 702, 715, 99 P.3d 1092, 1105 (Ct. App. 2004). An award of attorney fees is appropriate where "the case involves a 'commercial transaction' and that such transaction is the gravamen of the lawsuit." *Bream v. Benscoter*, 139 Idaho 364, 370, 79 P.3d 723 (2003).

A "commercial transaction" is defined as "all transactions except transactions for personal or household purposes." Idaho Code § 12-120(3). "Idaho Code § 12-120(3) does not require that there be a contract between the parties before the statute is applied; the statute only requires that there be a commercial transaction." *In re University Place/Idaho Water Center Project*, 146 Idaho 527, 541, 199 P.3d 102, 116 (2008). Moreover, the Idaho Supreme Court "has given a broad meaning to the word 'transaction.'" *Id.*; *see also Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 728, 152 P.3d 594, 599 (2007) ("The commercial transaction ground in I.C. § 12-120(3) neither prohibits a fee award for a commercial transaction that involves tortious conduct . . . nor does it require that there be a contract.").

Here, Plaintiff's claims fall squarely within Idaho Code § 12-120(3) because they involve multiple commercial transactions entered into by the Corporation that Plaintiff contends are wrongful. The transactions alleged in the Complaint involve commercial transactions with Getrude McCann and with Plaintiff, himself. For example, Plaintiff acknowledges that the Corporation has paid dividends to Plaintiff and the other shareholders, but Plaintiff alleged that he is being oppressed because of the Corporation's failure to pay more dividends. Moreover, the remedy Plaintiff sought in this case was either a dissolution of the corporation or an order from the Court requiring the Corporation create a spin-off corporation owned by Plaintiff and transfer 36.68% of the Corporation's assets to that corporation – essentially a forced commercial

transaction with Plaintiff. These transactions constitute commercial transactions in that they are not for personal or household purposes. Thus, they fit within the broad definition of commercial transactions. An attorney fee award under Idaho Code § 12-120(3) is appropriate.

C. An Award Of Attorney Fees Is Appropriate Under Idaho Code § 12-121

Idaho Code § 12-121 permits an award of reasonable attorney fees to the prevailing party if the action was brought or pursued frivolously, unreasonably or without foundation. *See J-U-B Engineers, Inc. v. Security Ins. Co. of Hartford*, 146 Idaho 311, 318, 193 P.3d 858, 865 (2008). This is not the first time Plaintiff has filed a derivative demand against the Corporation without complying with the statutory demand requirement. Rather, this is the second time Plaintiff has engaged in the same frivolous conduct. If taking an action in litigation in defiance of both a clear statutory requirement and an express Idaho Supreme Court holding does not constitute frivolous conduct, then just about nothing else would.

Moreover, this Court plainly explained to Plaintiff at the very beginning of this case that Plaintiff would "have to prove *irreparable* rather [than] reparable injury to the corporation" to survive summary judgment. *See* March 4, 2009 Order, p. 11 (emphasis in original). Nevertheless, Plaintiff proceeded with this litigation even though he had absolutely no evidence of irreparable injury to the Corporation. Plaintiff had not evidence to support his claim when he filed his Complaint, and he still had not evidence to support his claim after taking voluminous discovery and requiring the Corporation to incur substantial attorney fees. This Court ultimately granted summary judgment because Plaintiff could present absolutely no evidence to support his claims. Bringing a cause of action without a shred of evidence to support that cause of action fits squarely within § 12-121's provision for an attorney fee award for an action brought unreasonably or without foundation.

D. Defendants' Request For Attorney Fees Is Reasonable Under The Rule 54(e)(3) Factors

The "reasonableness" of an attorney fee award is based on the trial court's consideration of the factors in I.R.C.P. 54(e)(3). *Sun Valley Potato Growers, Inc. v. Texas Refinery Corp.*, 139 Idaho 761, 769, 86 P.3d 475 (2004). The factors of Rule 54(e)(3) include: time and labor; difficulty; skill required; prevailing charges; fixed or contingent fees; time limitations; amount and result; undesirability of the case; relationship with the client; awards in similar cases; costs of automated research; and any other factors. *Id.* Attorney fees are a discretionary matter for the trial court and are reviewed under an abuse of discretion standard. *Id.* Although a trial court is not required to make "specific findings demonstrating how it employed any of the factors in Rule 54(e)(3)," it is required to consider those factors when determining the amount of fees to award. *Id.*

1. The Time and Labor Required

The time and labor required in defending against Plaintiff's claims is set forth in detail in the daily billing itemizations attached to the affidavits of Defendants' respective counsel. Notably, this case involved several factors that made this a relatively time consuming and expensive case to litigate. First, Plaintiff brought claims not only against the Corporation, but also against the Director Defendants, William V. McCann, Jr. and Gary E. Meisner. The claims against the Defendants involved allegations of fraud and breaches of fiduciary duties. The nature of these claims, even though meritless, created potential conflicts of interest between the Corporation and the Director Defendants. Thus, William V. McCann, Jr. and Gary E. Meisner were required to obtain separate counsel, which significantly increased the cost of litigation in that multiple attorneys were required to attend hearings and depositions and otherwise participate

in the defense of Plaintiff's claims. Under Idaho Code Section 30-1-853, the Corporation advanced payment for the litigation expenses of the Director Defendants.

Despite the fact that the Defendants were required to obtain separate counsel, the Defendants took measures to keep litigation costs as low as possible. The Defendants entered into a joint defense agreement pursuant to which the Defendants shared research and jointly prepared pleadings and briefing. The Defendants agreed that most of the briefing in this case would be handled by John Ashby, an associate with Hawley Troxell, counsel for William V. McCann, Jr. This agreement not only avoided duplicative research and briefing, but allowed the briefing to be prepared at a billing rate significantly lower than the rates charged by Mr. McDevitt, Mr. McNichols or Mr. Clark.

Second, the cost of defending against Plaintiff's claims was relatively high in light of the very high stakes involved. Plaintiff sought dissolution of the Corporation, which Plaintiff contends is worth at least $20,000,000. Thus, this truly was "bet the company" litigation. Given the extremely high stakes and the serious nature of Plaintiff's allegations, Defendants were required to take Plaintiff's allegations seriously and put forth their best efforts.

Third, Plaintiff's tenacious litigation tactics increased the cost of the litigation. Plaintiff asserted not only a corporate dissolution cause of action, but also a derivative claim without first complying with the statutory demand requirement. Defendants successfully had the derivative cause of action dismissed, but only after multiple motions. After the Court dismissed the derivative cause of action, Plaintiff moved for reconsideration, which was denied. Plaintiff then moved to amend his Complaint to add a derivative cause of action after purporting to comply with the derivative demand requirement. That motion to amend also asked the Court to reconsider its prior ruling for a second time. Defendants successfully defended against these

motions. This case also involved extensive discovery, the cost of which was increased substantially by Plaintiff's attempts to take discovery related to pre-2001 events, resulting in multiple motions resolved by the Court. Plaintiff served multiple sets of written discovery on each Defendant and also took several depositions. Defendants took only Plaintiff's deposition, but Plaintiff took the depositions of William V. McCann, Jr., Lori McCann, Gary E. Meisner, Gertrude McCann and Dorothy Snowball.

The nature of Plaintiff's claims and Plaintiff's litigation tactics significantly increased the cost of this litigation. As explained by the United States Supreme Court, a party "cannot litigate tenaciously and then be heard to complain about the time necessarily spent . . . in response." *City of Riverside v. Rivera*, 477 U.S. 561, 580 n. 11 (1986).

2. The Novelty and Difficulty of the Questions

This case involved a claim for dissolution of the Corporation. That claim is relatively straightforward in the required elements for such a drastic remedy, but Plaintiff complicated the case by his novel, but meritless, theories. Plaintiff's novel arguments, i.e., that the corporation was irreparably harmed by a speculative and remote risk of tax liability, by a speculative inability to collect debts owed to it and even by the fact that it has had to incur attorney fees to defend itself, complicated the defense of this case. Defendants were required to obtain the assistance of an accountant expert witness to rebut these novel assertions.

3. The Skill Requisite to Perform the Legal Service Properly and the Experience and Ability of the Attorney in the Particular Field of Law

Given the nature of Plaintiff's claims and the drastic remedy he sought, the Defendants reasonably sought the assistance of experienced and skilled counsel. Mr. Clark, Mr. McNichols and Mr. McDevitt each represented their respective clients in *McCann I*, and brought their

knowledge from that prior case to this litigation. As set forth in their respective affidavits, Mr. Clark, Mr. McNichols and Mr. McDevitt are each skilled and experienced attorneys.

4. The Prevailing Charges for Like Work

The hourly rates charged by counsel for the defendants are the same hourly billing rates they generally charge to clients for their services. Numerous cases have held that the actual rate charged by counsel to clients is generally held to the "best evidence" of the proper hourly rate to be allowed in statutory fee cases. *See Black Grievance Comm. v. Philadelphia Elec. Co.*, 802 F.2d 648, 652 (3d Cir. 1986), *vacated on other grounds,* 483 U.S. 1015 (1987) (market-rate value is "generally reflected in the attorney's normal billing rate"); *Tamazzoli v. Sheedy,* 804 F.2d 93, 98 (7th Cir. 1986) ("For private counsel with fee-paying clients, the best evidence is the hourly rate customarily charged by counsel or by her law firm."); *see also Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 660 (7th Cir. 1985) ("The hourly rates used to compute the lodestar are typically the rates lawyers charge clients who pay on a regular basis."). Their rates are comparable to, if not lower than, rates charged by similarly experienced counsel in Idaho. *See LaPeter v. Canada Life Ins. of America*, 2007 WL 4287489, *1-2 (D. Idaho) (Winmill, C.J.) (approving rates of $300 and $335/$355 for attorneys with 20 and 30 years experience respectively).

5. Whether the Fee is Fixed or Contingent

The fees charged by counsel for the Defendants were fixed hourly rates that were based upon the knowledge and experience of each attorney and agreed to by Defendants.

6. Time Limitations Imposed by the Client or the Circumstances of the Case

The Defendants desired this matter to be resolved as quickly as possible as this litigation was expensive not only in terms of dollars but in the time and personal resources of the Defendants.

7. The Amount Involved and the Results Obtained

As set forth above, this was a "bet the company" case in that Plaintiff sought dissolution of the Corporation. Defendants prevailed on all claims asserted by Plaintiff. Notably, by prevailing on summary judgment, Defendants were able to save the substantial cost of a trial. Plaintiff's counsel stated at the hearing on the motion for summary judgment that he estimates attorney fees would have been approximately $500,000 by the end of a trial.

8. The Undesirability of the Case

Plaintiff sought the dissolution of a long-standing family corporation. The case involved several undesirable aspects, including the fact that this case involves disputes between family members, which brings with it unique emotional implications. For example, Plaintiff taking the deposition of his own Mother created an uncomfortable and undesirable situation.

9. The Nature and Length of the Professional Relationship With the Client

Mr. McDevitt, Mr. Clark and Mr. McNichols have had a longstanding relationship with their respective clients, including prior representation in *McCann I.*

10. Awards in Similar Cases

The District Court in *McCann I* awarded attorney fees in the amount of $101,016.83. Unlike this case, which was resolved only after substantial discovery and a motion for summary judgment, *McCann I* was resolved on a motion to dismiss. In *McCann I*, very little discovery took place and no depositions were taken. The Idaho Supreme Court affirmed and awarded

attorney fees on appeal. Other than the award of attorney fees in *McCann I*, Defendants are not aware of other similar cases.

11. The Reasonable Cost of Automated Legal Research

Defendants used Westlaw to perform legal research in this case. Given the limited Idaho case law interpreting the corporate dissolution statute, Westlaw was used to research decisions from other jurisdictions. Westlaw expenses were billed to Defendants as set forth in the invoices attached to the Affidavit submitted by Mr. Clark.

E. Defendants' Request For Costs as a Matter of Right and Exceptional Costs Should Be Granted

In addition to its costs as a matter of right, Defendants request an award of non-taxable costs pursuant to I.R.C.P. 54(d)(1)(D). Rule 54(d)(1)(D) states that additional, non-taxable, costs "may be allowed upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party." Discretionary costs may include costs related to long distance telephone calls, photocopying, faxes, travel expenses, and expert witnesses. *See Hayden Lake Fire Protection Dist. v. Alcorn*, 109 P.3d 161, 168 (2005).

This is an exceptional case warranting an exceptional award of non-taxable costs. Plaintiff sought the extraordinary remedy of dissolution of the Corporation. Moreover, this was the second in a series of long and drawn-out cases and the second time Plaintiff has failed to comply with the clear statutory requirement of serving a written demand prior to filing a derivative action. The Court made a light-hearted reference during the summary judgment hearing about a *McCann III* lawsuit in the future. An award of attorney fees, costs and exceptional costs may deter future meritless litigation.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully ask this Court to issue an award of attorney fees and costs in favor of Defendants in the amount of $340,040.25 in attorney fees, $4,727.18 in costs as a matter of right, and $9,927.43 in discretionary costs.

DATED THIS 17th day of March, 2010.

McDEVITT & MILLER LLP

By _____
Charles F. McDevitt, ISB No. 835
Attorneys for Nominal Defendant McCann Ranch & Livestock Co.

DATED THIS 18 day of March, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By _____ ISB # 7228
for Merlyn W. Clark, ISB No. 1026
Attorneys for Defendant
William V. McCann, Jr.

DATED THIS 18th day of March, 2010.

CLEMENTS BROWN

By //S//
Michael E. McNichols
Attorneys for Defendant Gary Meisner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of March, 2010, I caused to be served a true copy of the foregoing DEFENDANTS' JOINT MEMORANDUM IN SUPPORT OF REQUEST FOR COSTS AND ATTORNEY FEES by the method indicated below, and addressed to each of the following:

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Attorneys for Nominal Defendant

FILED
2010 MAR 18 PM 3 07
PATTY O. WEEKS
CLERK OF THE DISTRICT COURT
Dwt Kayle
DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN, Plaintiff, vs. WILLIAM V. McCANN, JR., and GARY E. MEISNER, Defendants. McCANN RANCH & LIVESTOCK COMPANY, INC., Nominal Defendant.	Case No. CV 08-01226 AFFIDAVIT OF CHAS F. MCDEVITT

STATE OF IDAHO)
: ss
County of Ada)

CHAS F. McDEVITT being first duly sworn on oath deposes and states as follows:

1. I am an adult citizen of the United States of America, competent to testify as a witness, and make this Affidavit based on my personal knowledge.
2. I have been retained by Nominal Defendant, McCann Ranch & Livestock Company, Inc., to defend it in this case. McCann Ranch & Livestock Company is advancing the costs of defending the Corporation, including the payment of my legal fees incurred on its behalf.

3. I have cooperated with counsel for the other Defendants pursuant to the terms of a Joint Defense Agreement entered into between all of the Defendants.
4. I agreed to participate in the defense of this case for fees on an hourly basis calculated from April 18, 2008, to March 12, 2010, at the rate of $250.00 an hour.
5. I have performed generally the following legal services in connection with this case:
    1) Numerous individual telephone conversations with clients and other counsel.
    2) Numerous conference telephone calls with clients and co-counsel.
    3) Attendance and participation at corporate meetings.
    4) Filing, drafting and serving of pleadings.
    5) Filing, drafting and serving of written discovery to Plaintiff and responses to written discovery from Plaintiff.
    6) Attendance and participation in depositions of Defendants William V. McCann, and Lori McCann.
    7) Attendance and participation in depositions of Dorothy Snowball.
    8) Participation in the research for and preparation of Motions to Dismiss and a Motion for Summary Judgment and supporting affidavits and papers; participation in oral argument on Motion to Dismiss; participation by telephone in arguments on discovery motions; personal participation in oral argument on Motion for Summary Judgment.
6. The total fees charged to the client in this matter are in the amount of $22, 837.50.
    a) The time that I have spent on this matter is a total of 91.35 hours, performing the tasks set forth in paragraph herein above as well as those identified on the billing statements attached as exhibits to this Affidavit which are all of the invoices submitted by my firm to McCann Ranch and Livestock Co., since the

commencement if this action. Of the amounts billed $19,750.00 were for legal services prior to November 12, 2009.

b) This action required knowledge of corporate structure, corporate performance and ability to identify accounting transactions and the reflection of those on the records of the Company.

c) Representation in this matter required experience in corporate law and corporate matters, as well as the knowledge of accounting. The attorney performing this for our firm has practiced law for more than fifty (50) years, has also been a corporate executive and general counsel of major firms required in this matter.

d) The charges for this type of work prevailing in this community by attorneys of like background are from $250.00-$350.00 per hour.

e) The engagement was for the services to be performed at a rate of $250.00 per hour.

f) The client desired this matter to be terminated as quickly as possible as it was expensive not only in terms of dollars but in the time and personal resources of the corporate executives involved.

g) The Plaintiff in this action sought to divide what the Plaintiff alleged to be a Twenty Million Dollar Company into three parts. This liquidation and dissolution of the firm was prevented in this action.

h) This action was a dispute between family members which is always a contentious type of litigation in which to engage.

i) This firm has represented this client in a similar matter nine years previous.

j) I am not aware of results in similar actions as they are not frequently brought in this jurisdiction.

7. All of the legal services performed by my firm were necessary and reasonable and the hourly rates and the time spent are reasonable.

8. Attached as exhibits to this Affidavit are all of the invoices submitted by my firm to McCann Ranch & Livestock Co., since the commencement of this action.

Dated this 18th day of March, 2010.

Chas F. McDevitt

STATE OF IDAHO)
) ss.
County of ADA)

SUBSCRIBED AND SWORN before me this 18th day of March, 2010.

HEATHER M. HOULE NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at Boise
My commission expires 6/20/2012

Respectfully Submitted 18th day of March, 2010.

McDEVITT & MILLER LLP

By:
Chas F. McDevitt *(ISB No. 835)*
Dean J. Miller *(ISB No. 1968)*
Attorneys for Nominal Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of March, 2010, I caused to be served a true copy of the foregoing AFFIDAVIT OF CHAS F. MCDEVITT by the method indicated below, and addressed to each of the following:

Timothy Esser ESSER & SANDBERG, PLLC 520 East Main Street Pullman, WA 99163	X U.S. Mail, Postage Prepaid ____ Hand Delivered ____ Overnight Mail X E-mail ____ Telecopy
Andrew Schwam SCHWAM LAW FIRM 514 South Polk, #6 Moscow, ID 83843	X U.S. Mail, Postage Prepaid ____ Hand Delivered ____ Overnight Mail X E-mail ____ Telecopy
Michael E. McNichols CLEMENTS BROWN 321 13th Street P.O. Box 1510 Lewiston, ID 83501-1510	X U.S. Mail, Postage Prepaid ____ Hand Delivered ____ Overnight Mail ____ E-mail ____ Telecopy
Merlyn Clark HAWLEY TROXELL ENNIS 877 Main Street, Suite 1000 P.O. Box 1617 Boise, ID 83701-1617	X U.S. Mail, Postage Prepaid ____ Hand Delivered ____ Overnight Mail ____ E-mail ____ Telecopy

Heather Houle

McDEVITT & MILLER, LLP

McDevitt & Miller LLP
Lawyers

(208) 343-7500
(208) 336-6912 (Fax)

420 West Bannock Street
P.O. Box 2564-83701
Boise, Idaho 83702

Chas. F. McDevitt
Dean J. (Joe) Miller

July 1, 2009

Mr. William McCann Jr.
McCann Ranch & Livestock Co.
1027 Bryden
Lewiston, ID 83505

Professional Services re: McCann v. McCann

Date	*Activity*
10-Oct	Receive and Review Plaintiff's First Interrogatories
15-Oct	Draft Transmittal Letter to Mr. McCann
17-Oct	Receive and Review Amended Complaint; Draft Transmittal Letter to all Parties.
21-Oct	Receive and Review Motion to Dismiss; Receive and Review Email Correspondence; Prepare and Participate in Telephone Hearing.
24-Oct	Draft Motion to Dismiss Amended Complaint;
27-Oct	Revise and Review Motion to Dismiss Amended Complaint
3-Nov	Receive and Review Order of Recusal
12-Nov	Receive and Review Motion to Stay Discovery
14-Nov	Draft Motion to Stay Discovery
4-Dec	Receive and Review Email Correspondence re: Judge
15-Dec	Receive and Review Plaintiff's Motion to Compel Discovery; Memorandum in Support, Affidavit of Esser; Notice of Hearing
16-Dec	Receive and Review Amended Notice of Hearing
20-Dec	Hearing on all Motion; Prepare and Participate
22-Dec	Draft Memorandum in Opposition to Plaintiff's Motion to Compel Discovery
31-Dec	Receive and Review Defendant's Reply Memo in Support of Motion to Dismiss
5-Jan	Receive and Review Sales Agreement
8-Jan	Review Memorandum & Order
10-Jan	Receive and Review Email Correspondence
13-Jan	Receive and Review Plaintiff's Response to Defendant's Reply Memorandum
6-Mar	Receive and Review Plaintiff's Motion for Reconsideration; Review Emails;

10-Mar	Receive and Review Partial Summary Judgment; Memorandum and order; Memo and Order Concerning Discovery
11-Mar	Telephone Conference Call
13-Mar	Receive and Review Attorney Client Memorandum
17-Mar	Receive and Review Memorandum to Counsel; Notice of Hearing
20-Mar	Receive and Review Email Transmittals
25-Mar	Receive and Review Transmittal Letters from Mr. McNichols; Gary Meisner's Answers to Plaintiff's 1st Interrogatories; Telephone Conference
	Receive and Review Notice of Compliance
	Draft Response to Plaintiff's First Interrogatories and Requests for Production; Draft Transmittal Letters to Court
30-Mar	Draft Motion to Set Oral Argument; Motion to Schedule Pre-Trial Conference
31-Mar	Receive and Review Transmittal Letter from T. Esser and Plaintiff's First Set of Interrogatories & Request for Production of Documents; Revise letter from T. Esser re: Pre-trial Conference
4-Apr	Receive and Review Letter from L. McCann re: Financials
1-Apr	Receive Email Correspondence from Judge Carey; Receive Notice of Hearing and Letter to Judge Carey from T. Esser;
14-Apr	Prepare for and Attend Telephonic Conference Call
23-Apr	Receive Email Correspondence from all Parties re: Conference Call
24-Apr	Prepare for and Attend Telephonic Conference Call
27-Apr	Receive and Review Email Correspondence from L. McCann & M. Clark
30-Apr	Draft Motion to Bifurcate; Motion to Reconsider Decision and Memorandum in Support of Motion to Reconsider; Draft Correspondence to Court;
12-May	Receive and Review Email Transmittals; Draft letter and Plaintiff's 2nd Requests to W. McCann Jr.
14-May	Prepare for and Attend Hearing Telephonic Conference Call
18-May	Receive and Review Correspondence from T. Esser re: Gertrude McCann; Review Responses to Plaintiff's 2nd Production Requests
27-May	Draft letter to Mr. Esser

29-May	Receive and Review from T. Esser Plaintiff's Supplemental Answer to Defendant Meisner's Interrogatories; Plaintiff's Third Request for Production of Documents; Receive and Review Correspondence from Esser re: Deposition Dates; Notice of Deposition of Gertrude McCann; Subpoena to Attend Deposition.
	Receive and Review Email Correspondence from L. McCann & M. Clark

Total Attorney's Fees: **$7,650.00**

Date	Item	Amnt	Cost
14-Nov	Copies	102	$15.30
	Postage	5.77	$5.77
4-Dec	Alaska Airlines	192.00	$192.00
13-Jan	Copies	33	$4.95
25-Mar	Copies (Interrogatories)	118	$17.70
	Copies	8.12	$8.12
25-Mar	Postage	38	$5.70
	Copies (Motions)	98	$14.70
30-Apr	Copies (Motions)	6.04	6.04
	Postage	45	$6.75
7-May	Copies	2.95	2.95
	Postage	50	$7.50
8-May	Copies	2.95	2.95
	Postage	20	$3.00
11-May	Copies	2.44	2.44
	Postage	29	$4.35
21-May	Copies	1.39	1.39
	Postage		

Total Costs: **$301.61**

Total Attorney's Fees and Costs: ***$7,951.61***

McDevitt & Miller LLP
Lawyers

420 West Bannock Street
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Boise, Idaho 83702

(208) 343-7500
(208) 336-6912 (Fax)

Chas. F. McDevitt
Dean J. (Joe) Miller

February 4, 2010

Mr. William McCann, Jr.
McCann Ranch & Livestock Co.
1027 Bryden
Lewiston, Idaho 83501

McCann v. McCann
Professional Services Rendered June 2009 through December 2009

STATEMENT OF ACCRUALS

Chas F. McDevitt Attorney Hours (@ $250/hr)

Receive and review Amended Notice of Deposition re: Gertrude McCann; Prepare and file McCann Response to Plaintiffs 2nd Interrogatory Requests; Receive and review correspondence re: depositions; Review and respond to email correspondence from parties re: Summary Judgment Motion; Review Responses to Plaintiff's 3rd Production Requests; Receive and Review Deposition Notice; Receive and review draft of Memorandum in Support of Motion for Summary Judgment;

Draft Opinion Letter; Prepare and file Notice of Waiver of Participation in the taking of Deposition of Ronald McCann; Review and respond to email correspondence from parties re: Reinstein; Review and respond to email correspondence from parties re: discovery; Receive and review QuickBooks files; Review and respond to email correspondence from parties re: discovery; Order pursuant to I.R.C.P. Rule 16; Review and respond to email correspondence from parties re: Reinstein; Review and respond to email correspondence from parties re 1099's; Review and respond to email correspondence from parties; Receive and review correspondence from T. Esser's Answers to McCann's first Discovery Requests;

Review and respond to email correspondence from parties; Receive and Review from T. Esser Plaintiffs Motion to Compel Discovery, Declaration and Memorandum of Authorities; Receive and review Memo in Support of Motion for Protective Order; Receive and review Affidavit of T. Esser; Draft and file Motion for Protective Order; Draft letter to McCann re: Opinion of Demand; Review and respond to email correspondence from parties; Prepare for and attend hearing; Review and respond to email correspondence from parties; Receive and review Second Memorandum and Order Concerning Discovery from Judge; Receive and review correspondence from T. Esser re: depositions; Receive and review History of notes from McCann; Draft letter to T. Esser, Minutes, Waiver of Notice, Demand Letter and Opinion letter;

Prepare and participate in telephone conference; Receive and review correspondence from T. Esser re: work papers; Review and respond to email correspondence from parties; Receive and review Plaintiffs Motion to Amend Amended Complaint and Affidavit of T. Esser; Review and respond to email correspondence from parties re: Trustee; Receive and review correspondence re: Ms. Snowball.

McCann Ranch & Livestock Co.
Statement of Professional Services
Continued Page 2

Draft and file Nominal Defendant's Responses to Plaintiffs Fourth Discovery Requests and Notice of Compliance; Review and respond to email correspondence from parties; Draft letter to T. Esser; Receive Notice of Hearing and correspondence from T. Esser; Review and respond to email correspondence from parties re: Hearing on Motion to Amend; Review and respond to email correspondence from parties;

Receive and review correspondence from T. Esser; Review and respond to email correspondence from parties; Prepare for and participate in telephone conference; Travel and prepare for depositions; Receive and Review Plaintiffs Responses to 2nd Set of McCann Interrogatories; Receive and review correspondence from T. Esser; Draft and file Memorandum in Opposition to Motion to Amend Amended Complaint; Receive and review Plaintiffs Reply Memorandum re: Motion to Amend Amended Complaint; Review G. Meisner's Joinder; Review and respond to email correspondence from parties; Review and respond to email correspondence from Mr. Clark; Review Stipulation for Revised Pretrial Schedule;

Review and respond to email correspondence from parties re: Privilege Logs; Review and respond to email correspondence from parties re: Petition for Rehearing; Prepare for and attend hearing re: Motion to Amend Amended Complaint; Receive and review Plaintiffs Motion for Review of Privilege Log; Review and respond to email correspondence from parties; Draft correspondence to T. Esser re: Ms. Snowball. Draft and file Response to Plaintiffs Motion for Review of Privilege Log and Supplemental Authority in Response to Plaintiffs Motion for Review of Privilege; Review and respond to email correspondence from parties; Review and respond to email correspondence from parties; Review and respond to email correspondence from parties; Motion for Summary Judgment; Review Receive and review email correspondence from T. Esser re: exhibits; Receive and review correspondence from T. Esser re: Second Set of Interrogatories; Receive and review Order and Stipulation from T. Esser. Prepare for and participate in depositions;

Receive and Review Memorandum and Order on Motion to Amend Previously Amended Complaint and Memorandum to Counsel Receive and review communication from Esser re: deposition of Dorothy Snowball; Draft letter to Esser re: lease agreements; Receive and review Affidavit of T. Esser in Support to Plaintiffs Motion for Review of Privilege Log; Review and respond to email correspondence from parties; Receive and review email correspondence from McCann re: Dorothy Snowball; Review notebook; Hand Deliver notebook re: 46 documents withheld to Judge Carey; Receive and review email correspondence from L. McCann re: journal entries; Review draft of Affidavit of Dorothy Snowball.

Draft Nominal Defendant's Response to 5th Production Requests; Review and respond to email correspondence from parties; Receive and review exhibits to Responses; Participate in conference call; Revise draft Nominal Defendant's Response to 5th Production Requests; Finalize Nominal Defendant's Response to 5th Production Requests; Draft correspondence to Esser; Review and respond to email correspondence from parties re: letter to Esser; Revise letter to Esser; Participate in conference call; Finalize letter to Esser

Total Attorney Hours 51 Hours

McCann Ranch & Livestock Co.
Statement of Professional Services
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COSTS

Copies (166 copies x .15)	24.90
Postage	32.34
Federal Express:	47.05
Research:	482.60
Airline Fees:	279.20
Hotel Fees:	328.00

Total Costs	*$ 1,194.09*
Total Attorney's Fees	*$12,750.00*
Total Amount Due	**$13,944.09**

McDevitt & Miller LLP
Lawyers

420 West Bannock Street
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(208) 343-7500
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Chas. F. McDevitt
Dean J. (Joe) Miller

March 12, 2010

Mr. William McCann, Jr.
McCann Ranch & Livestock Co.
1027 Bryden
Lewiston, Idaho 83501

McCann v. McCann
Professional Services Rendered January 2010 through February 2010

STATEMENT OF ACCRUALS

Chas F. McDevitt Attorney Hours (@ $250/hr)

Review and respond to email correspondence from parties re: Motion for Summary Judgment; Participate in telephone conference; Prepare and file with the Court Motion and Memorandum in Support of McCann Ranch's Motion for Summary Judgment, Affidavit of Dorothy Snowball, Affidavit of William v. McCann, Affidavit of James A. Schoff, and Affidavit of Gary Meisner. Participate in telephone conference re: Summary Judgment; Prepare and file Notice of Hearing; Participate in telephone conferences.

Receive and review Stipulation to Amend Order re: Expert Witness Depositions, and Order ; Receive and review Plaintiff's Responsive Summary Judgment Memorandum and Affidavits; Review and respond to email correspondence from parties re: Motion for Summary Judgment; Participate in telephone conference call; Prepare and file Affidavit of Counsel (CFM) in Support of McCann Ranch's Motion for Summary Judgment; Participate in telephone conference call; Receive and review exhibits re: Defendant's Expert Witness List; Prepare and file with the Court Defendant's Expert Witness List; Prepare and file McCann's Motion to Strike and Disregard Testimony, and Memorandum in Support of Motion; Receive and review G. Meisner's Joinder; Receive and Review Plaintiff's Response to McCann's Motion to Strike; (No charge for preparation for and attendance at Motion for Summary Judgment Hearing—subpar performance); Review and respond to email correspondence from parties re: Plaintiff's Response to Motion for Summary Judgment; Receive and Review Plaintiff's Correction/Supplemental Authority; Prepare and file Supplemental Authority;

Total Attorney Hours 9.75 Hours

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McCann Ranch & Livestock Co.
Statement of Professional Services
Continued Page 2

COSTS

Copies (534 copies x .15)	80.10
Postage	38.90
Federal Express:	59.21

Total Costs	*$ 178.21*
Total Attorney's Fees	*$2,437.50*
Total Amount Due	**$2,615.71**